APPENDIX-A

STATE OF KANSAS,
BEFORE THE KANSAS DEPARTMENT
OF HEALTH AND ENVIRONMENT

In the Matter of the Violations of
Provision of K.S.A. 65-3401 *et seq.* by
Durand Dickerson, individually and d/b/a
Dickerson Recycling Case No. 00-E-0039
1514 10th Avenue
Leavenworth, Kansas 66048

REPORT OF PRESIDING OFFICER
AND INITIAL ORDER

This matter comes before Shari Feist Albrecht, presiding officer for the Kansas Department of Health and Environment (KDHE), to consider and decide whether Durand Dickerson should be required to repay $39,216.38 in solid waste management grant funds and whether the proposed civil penalty for the alleged violation of Kansas solid waste laws is reasonable and proper.

INTRODUCTION

Durand Dickerson d/b/a/ Dickerson Recycling (Dickerson) timely appeals from a Notice of Administrative Order and Intent to Assess a Civil Penalty (Notice) proposing to require Dickerson to repay $39,216.38 in solid waste management grant funds and to assess a $5,000 civil penalty against Dickerson. KDHE alleges that Dickerson spent the grant funds for purposes outside the scrope of the grant agreement between KDHE and Dickerson. KDHE further alleges that Dickerson openly dumped and improperly stored solid waste in violation of Kansas solid waste laws. The Director of KDHE's Division of Environment issued the notice, which was mailed to Dickerson on February 28, 2000.

Shari Feist Albrecht, presiding officer, conducted a prehearing conference on April 13, 2000, and issued a Prehearing Order and Notice of Hearing and Order to Show Cause to the parties on April 18, 2000. The presiding officer issued an Order Reserving Ruling and Amending Notice of Hearing to the parties on June 26, 2000. In response to the Order Reserving Ruling, KDHE filed a Request for Clarification with the presiding officer on July 12, 2000 and on July 13, 2000, Dickerson filed a Petition ..... for Judicial Review and Temporary Injunction in the Shawnee County District Court in Case No. 00C827. The presiding officer conducted a status conference in this matter on July 17, 2000, and mailed an Order of Continuance and Order of Clarification to the parties on July 19, 2000.

On January 4, 2001, the Shawnee County District Court filed a Memorandum Opinion and Entry of Judgment dismissing Dickerson's petition for judicial review and denying his request for injunctive relief. On January 31, 2001, Dickerson filed with the Shawnee County District Court a Notice of Appeal to the Kansas Court of Appeals.

The presiding officer conducted a status conference in this matter on February 6, 2001, and mailed a Second Prehearing Order and Notice of Hearing to the parties on Feb. 13, 2001.

Presiding Officer Albrecht conducted the hearing at 10:00 a.m. on April 17, 2001, in KDHE's Air Conference Room, Building 283, Forbes Field, Topeka, Kansas. KDHE appeared through counsel, William L. Anderson; Durand Dickerson appeared in person and *pro se.*

At the hearing, the presiding officer admitted KDHE Exhibits A-1 through A-16, B-1, and C-1 through C-3. The presiding officer closed the record at the conclusion of the hearing on April 17, 2001, and, as agreed by the parties during the course of the hearing (Tape 3, side B), re-opened and closed the record on April 25, 2001, to receive the order

of the Kansas Court of Appeals issued in Case No. 01-86664-A on April 20, 2001. The Court dismissed Dickerson's appeal of the Shawnee County Court Decision in Case No. 00C-827 for failure to exhaust administrative remedies and further denied Dickerson's motion for stay of the administrative hearing.

On her own motion, the presiding officer extended the time limits for issuing this initial order until June 8, 2001. *See* Order Extending Time Limits issued May 15, 2001.[1]

As set out more fully below, the presiding officer holds that Dickerson is legally responsible for repaying to the solid waste management fund $39,216.38 in solid waste grant funds that Dickerson spent for ineligible project cost. The presiding officer further holds that Dickerson improperly dumped and stored waste paper at 1500 South 2nd, Leaven-

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[1]On June 4, 2001, Dickerson filed an objection to the Order Extending Time Limits in which he questions the presiding officer's jurisdiction to reopen the record and to extend the limits for issuing an initial order in this matter.

As noted above and on the record in this proceeding, neither party objected to the presiding officer's statement of intent to reopen the record to consider any Court of Appeals decision issued after the administrative hearing on April 17, 2001. As a result, the presiding officer finds that Dickerson waived any objection to reopening the record for this limited purpose.

With respect to the time limits issue, K.S.A. 77-526 establishes that initial and final orders are to be rendered by the presiding officers and agency heads or designees, respectively, and further addresses the requirements for initial and final orders. Contrary to Dickerson's argument, the provision of K.S.A. 77-526(g) are directed to the presiding officer and allow the presiding officer to extend the time limits for rendering an initial order in on of three scenarios, either a waiver by the parties or an extension with the written consent of the parties for good cause shown, which requires only that the presiding officer finds that the Order Extending Time Limits meets the requirements of K.S.A. 77-526 and that Dickerson's argument is without merit.

worth, Kansas, for which he should be assessed a civil penalty of $5,000.

ISSUES

1. Whether Dickerson expended $39,216.38 in solid waste management grant funds for expenses that were ineligible for funding under the terms of his grant agreement with KDHE?

II. Whether Dickerson openly dumped and improperly stored waste at the site of Dickerson Recycling and whether the proposed $5,000 civil penalty is reasonable and proper as applied to Dickerson in this case?

LEGAL AUTHORITY

KDHE seeks to recoup $39,216.38 in grant funds it made available to Dickerson from the solid waste management fund established in K.S.A. 65-3415 and 65-3414a. KDHE further seeks to assess a $5,000 penalty under K.S.A. 65-3419 against Dickerson for violation of K.S.A. 65-3409 authorizes the director of KDHE's Division of Environment to empose a penalty of up to $5,000 per day for each violation of K.S.A. 65-3409(a).

DISCUSSION

The presiding officer, having heard the testimony and reviewed the record, and being fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. KDHE's solid waste grant program, known as the Competitive Plan Implementation Grant Program, began in 1995 for state fiscal year 1996. Its purpose is to encourage

public and private entities to develop and to implement recycling, composting, source reduction, waste reduction and public education programs. The Secretary of KDHE, with the advise and counsel of the solid waste grants advisory committee (SWGAC), initially awarded two million dollars in grant money annually which was available to grant applicants in two one-million increments called rounds, each round six months in duration. SWGAC continues to establish the grant rounds and to announce grant availability through notices, press releases, and radio and television advertising, which indicate that grant applications are available upon request. KDHE's grant process is open, meaning that the applicants may freely speak with staff during the pendency of the grant award determination. (Testimony of Kent Foerster, Tape 1, Side A).

2. Kent Foerster, chief of KDHE's planning, grants, and public education unit, recalled meeting Durand Dickerson at a solid waste planning meeting and discussing with Dickerson the grant application process in general terms. KDHE provided a Guidance Document and Application Forms packet to Dickerson. The guidance document included general application information and requirements, which identified both eligible and ineligible projects for grant funds. (Testimony of Kent Foerster, Tape 1, Side A and Tape 2, Side A; KDHE Ex. A-16.)

3. Dickerson filed a grant application and project with KDHE, dated December 22, 1995, in which he requested $205,573.50 in state funding that he proposed to matched with $68,524.50. Foerster explained that the statute authorizing the grant K.S.A. 65-3415, permits KDHE to issue grants only in an amount up to 75% of the project costs. The remaining costs are the responsibility of the grant recipient to match. (Testimony of Kent Feorster, Tape 1, Side A; KDHE Ex. A-16, p. 1.)

4. Pursuant to procedure established by the SWGAC, KDHE solid waste management staff reviewed Dickerson's grant application and prepared a project synopsis standardized for review and scoring by SWGAC. In its synopsis, KDHE staff noted a concern about the connection between Dickerson and another grant applicant, I.M. Fuimaono, who identified but did not explain the role of Dickerson Recycling in Fuimaono's proposed school recycling program. In this first round of the grant process, SWGAC eliminated the funds Dickerson requested for its school recycling program and awarded to Dickerson a grant of $52,411.50 to fund only capital equipment not tied to schools[2] and advertising costs: SWGAC excluded funds Dickerson requested for staff salaries, travel, supplies, professional service, training, and specified equipment (a baler/conveyor and 500 barrels). (Testimony of Kent Foerster, Tape 1, Side A; KDHE Ex. A-2)

5. Dickerson's grant application was one of 31 that KDHE received in round one of the solid waste grant program. The grant applicants sought a total of $3,699,042.60 in grant funds. SWGAC awarded 17 applicants for a total of $908,590.00. (Testimony of Kent Foerster, Tape 1, Side A.)

6. By letter dated March 19, 1996, William Bider, Director of KDHE's Bureau of Waste Management and Chairman of SWGAC, notified Dickerson that SWGAC had awarded him the reduced grant amount of $52,411.50 and provided Dickerson with two originals of the Competitive Plan Implementation Contract, a standard form contract that incorporated the terms of Dickerson's proposal as approved by

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[2]Of the capital equipment items that Dickerson identified in his grant application, SWGAC approved a Dodge diesel truck, four storage trailers, a forklift, computers, and printer and a shredder. (See KDHE Ex. A-2 and notations placed on Dickerson's Budget Breakdown by Cost Categories,)

SWGAC. In the letter, Bider noted that SWGAC excluded salary expenses for all grant applicants. Bider further observed that SWGAC excluded the remaining expense categories because they were not "absolutely necessary to enhance your existing operation ....." Bider stated that "preference was given to projects involving enhancements of existing facilities" (Testimony of Kent Foerster, Tape 1, Side A; KDHE Ex. A-3)

7. The Secretary of KDHE and Dickerson Recycling Center entered into the grant contract for the amount of $52,411.50. The contract period was identified as from April 1, 1996, through June 30, 1997. Durand Dickerson signed the agreement as the authorized representative of Dickerson Recycling Center on April 5, 1996. James J. O'Connell, then Secretary of KDHE, signed the agreement on April 23, 1996. (Testimony of Kent Foerster, Tape 1, Side A and Tape 2, Side A; KDHE Ex. A-4.)

8. The grant contract terms provided that KDHE would reimburse Dickerson for 75% of the actual expenditures allowed not to exceed $52,411.50; that KDHE would advance 25% of the grant amount upon execution of the contract; that it would reimburse the remaining grant balance based on progress reports and an Affifavit of Expenditures to be filed by July 31, 1997; and that KDHE would provide technical assistance to Dickerson and monitor the program for compliance with the approved project proposal. (Testimony of Kent Foerster, Tape 1, Side A; KDHE Ex. A-4, & I.)

9. Dickerson agreed to perform the activities according to the grant proposal as approved; to submit quarterly affidavits requesting reimbursement and a final affidavit of expenditures "only for the items agreed to in the grant proposal as approved by KDHE" by July 31, 1997; to maintain documentation and accounting of grant funds received and expended; to obtain approval from KDHE before contracting for services

or purchasing capital equipment not listed in the project proposal for services or equipment purchased with grant funds; to obtain prior approval from KDHE before selling, transferring or otherwise disposing of capital equipment purchased with grant funds; to submit a final report breaking down project costs and describing and summarizing the project; to return unexpended advance amounts within the grant period; to return other unused grant proceed; and to comply with federal, state and local solid waste laws. (Testimony of Kent Foerster, Tape 1, Side A; KDHE Ex. A-4, & II).

10. Foester opined that any grant funds that Dickerson used to purchase items that KDHE had not approved would be considered to be "unused grant proceeds" that would have to be returned to KDHE. (Testimony of Kent Foerster, Tape 1, Side A.)

11. Both KDHE and Dickerson mutually agreed that Dickerson's grant proposal and KDHE's notification letter would be incorporated by reference into the contract with the understanding that the approved project was based on cost estimates. The parties acknowledged that there would be flexibility in the use of funds for different categories as long as the changes were approved by KDHE, which reserved the right to disallow expenditures upon review. Dickerson agreed to submit reports and affidavits of expenditures of revised, actual expenditures. (KDHE Ex. A-4 & III).

12. By letter dated May 6, 1996, William Bider informed Dickerson that the Secretary had signed the grant contract and that Dickerson would receive a check for 25% of the project costs within three to five weeks. Bider further advised Dickerson that KDHE would reimburse him for the remaining expenses when he filed an affidavit of expenditures form, which KDHE would process only once each quarter. Bider emphasized that Dickerson would be required to submit an affidavit of expenditure for each fiscal year ending June 30 during the

grant period. (Testimony of Kent Foerster, Tape 1, Side B; KDHE Ex. A-6.)

13. Kent Foerster provided affidavit-of-expenditure forms and a guidance document to Dickerson as enclosures with a letter to Dickerson dated May 29, 1996. Foerster informed Dickerson that affidavit-of-expenditure forms were required to be submitted by July 31, 1996, for the fiscal year ending June 30, 1996, and by July 31, 1997, for the fiscal year ending June 30, 1997. The final report was to be submitted after the funds were expended or by July 31, 1997, whichever came first. (Testimony of Kent Foerster, Tape 1, Side A; KDHE Ex. A-5.)

14. KDHE became aware that there might be problems with Dickerson's grant when on April 16, 1997, Foerster received a telephone call from Paul Leavitt, the owner of the property at which Dickerson Recycling was located, 1500 South 2nd Street, Leavenworth, Kansas. Leavitt had leased the property to Dickerson for a two-year term. Leavitt complained that Dickerson had not paid rent for several months and that Dickerson had left stacks of paper that were stored outside on the property, which were no longer acceptable for recycling. Leavitt requested KDHE's help in cleaning up the property. (Testimony of Kent Foerster, Tape 1, Side B; Testimony of Paul Leavitt, Tape 2, Side B; KDHE Ex. A-7.)

15. Sometime between April and June 1997, KDHE employed a grant administrator who mailed a form letter to grant recipients reminding them of their obligation to submit year-end expenditure reports. During this time, Foerster recalled speaking to Dickerson by telephone and in person about Leavitt's complaint. Dickerson explained to Foerster that Leavitt had sued him several times with regard to the recycling facility, Dickerson also informed Foerster that he believe that Leavitt was contributing waste to the outside paper storage area. Dickerson told Foerster that he still had the Dodge diesel

truck he purchased with grant funds but that he was struggling with it apparently due to his legal entanglements with Leavitt.[3] (Testimony of Kent Foerster, Tape 1, Side B.)

16. On June 26, 1997, Foerster and Minta Rumsey, an employee in KDHE's Solid Waste Compliance and Enforcement Unit, inspected the property at 1500 South 2nd Street in Leavenworth, Kansas. Leavitt was no present when the inspectors arrived, but he appeared later during the course of the inspection. Foerster and Rumsay observer stacks of paper located outside the building, including computer paper, newspaper, white bond, shredded paper, and printer paper. Foester stated that a significant portion of the paper exhibited signs of water damage and staining. He opined that the paper was largely unacceptable for recycling. Leavitt also showed the investigators inside the building, which housed Leavitt's equipment. Leavitt denied that he was involved in the paper recycling business and explained that he repaired recycling equipment for resale. (Testimony of Kent Foerster, Tape 1, Side B and Tape 2, Side A; Testimony of Paul Leavitt, Tape 2, Side B; Testimony of Ron Smith, Tape 2, Side B; KDHE Ex. A-8, A-9.)

17. Foerster and Rumsey also visited Durand Dickerson at a new facility near the Leavenworth County Solid Waste facility south of Lansing, Kansas, at 719 Gilam. Foerster observed that Dickerson continued to collect and move materials and still appears to be in business. Dickerson told the inspectors that Leavitt had evicted him from his previous location and that he was involved in five lawsuits that Leavitt had

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[3]Dickerson's proposal identified several pieces of equipment he planned to purchase with grant funds, one of which was a Dodge diesel truck. (KDHE Ex. A-1, Section 2.0, Budget Breakdown By Cost Categories.) Foerster said that it was discretionary with Dickerson as to what pieces of capital equipment he actually purchased. (Testimony of Kent Foerster, Tape 1, Side B.)

filed against him. Dickerson felt that Leavitt had placed the paper material at the old facility in an attempt to put Dickerson out of business. Dickerson stated that his equipment and products were tied up in legal battles and that he had no way to pay his bills. Dickerson told Foerster that the truck he had purchased with grant funds had been repossessed ant that he was trying to get it back. (Testimony of Kent Foerster, Tape 1, Side B.)

18. Rumsey conducted a follow-up visit to the facility at 1500 South 2nd, Leavenworth, Kansas on July 24, 1997, at which time she took photographs showing that the paper stacks had been removed from the facility. Foerster believed that both Dickerson and Leavitt had removed paper from the facility. (Testimony of Kent Foerster, Tape 1, Side B and Tape 2, Side A; KDHE Ex. A-8, photo mounting sheet.)

19. Dickerson submitted a letter to KDHE dated July 30, 1997, in which he stated he "diverted $18,128.90 of state funds to assist me in my efforts to try to stay in business...." Dickerson listed the case numbers and filing dates of five legal actions taken against him. He included a listing of bond amounts for four of the five cases and a statement of the outcome of all the cases. Dickerson also stated that he was evicted from 1500 South 2nd, Leavenworth, Kansas, on February 28, 1997, and that the Court prohibited him from entering the property until April 25, 1997. (KDHE Ex. A-10.) Dickerson apparently attached his final report to this cover letter.

According to KDHE's evidentiary submission, Dickerson's final report included a Budget Summarization Sheet that shows he received grant funds in the amount of $13,102.75 in May 1996 and $32,904.63 in October 1996, for a total of $46,007.38. (KDHE Ex. 11.) The Budget Summarization Sheet also lists expenditures beginning April 3, 1996 through December 15, 1996. On the back of an exhibit labeled A-12

with the back separately labeled as A-13, there appears to be a continuation of these expenditures that begins with February 14, 1997, and continues through June 27, 1997. Exhibit A-13 also lists wages Dickerson paid on a quarterly basic from April 1996 through June 1997. Dickerson's final report also included a second Budget Summarization Sheet subheaded "Legal Fees," which purportedly details legal expenses incurred from August 23, 1996, through May 20, 1997 for a total of $18,128.90. (KDHE Ex. A-12) (Testimony of Kent Foerster, Tape 1, Side B; Revised KDHE Ex. A-10.[4]

20. Foerster observed that the wages included on Dickerson's Budget Summarization Sheet were not eligible grant expenses but could not use as Dickerson's 25% match amount. Foerster further opined that Dickerson's legal expenses were not eligible expenses. Foerster stated that neither the eligible project not the ineligible project sections of the guidance document (KDHE Ex. A-16) included legal expenses. He stated that the following costs were ineligible;

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[4]In order to clarify the record, the presiding officer has carefully reviewed KDHE Exhibits A-10 through A-13 and has determined that they should be combined and treated as one exhibit representing Dickerson's final report (Revised Ex. A-10). The result is one five-page exhibit that consists of Dickerson's two-page cover letter (formerly marked as Ex A-10 it also included the second page of the Budget Summarization Sheet), followed by the two-page Budget Summarization Sheet (formerly marked as Ex. A-11 and Ex. A-13), and concluding with the one-page Budget Summarization Sheet subheaded "Legal Fee" (formerly marked as Ex. A-12).

preparing the grant application; preparing the permit application; permit fees; on going operation and maintenance cost and costs incurred either before or after the grant period. Foerster considered legal and consulting fees and utility expenses to be ineligible as operating expenses. (Testimony of Kent Foerster, Tape 1, Side B and Tape 2, Side A; Revised KDHE Ex. A10, p. 4.)

21. Foerster stated that most of the expenditures listed on the Budget Summarization Sheet (KDHE Revised Ex. A-10, pp. 3-4) were legitimate grant fund expenditures. He explained that the Westfall GMC truck listed on the sheet was the truck that Dickerson purchased with grant funds that was later repossessed. (Testimony of Kent Foerster, Tape 1, Side B; KDHE Revised Ex. A-10.)

22. On August 1, 1997, after receiving and reviewing Dickerson's final report, Foerster prepared a memorandum for Bill Bider, the director of KDHE's Bureau of Waste Management and Chairman of SWGAC. Foerster advised Bider that the grant award letter KDHE sent to Dickerson declared salaries and professional services costs to be ineligible expenses. Foerster informed Bider that Dickerson's first affidavit of expenditures requested $6,127.25 for upgrading Baker and Clark forklifts, purchasing barrels and purchasing two used trailers[5]. Dickerson's second affidavit of expenditures requested $39,880.13 for purchasing a 1997 Freight-

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[5]KDHE did not offer Dickerson's first affidavit of expenditures into the record. From her comparison of KDHE Revised Ex. A-10 and KDHE Ex. A-14, the presiding officer has determined that Dickerson's first affidavit of expenditure requesting $6,127.25 represented 75% of his claimed expenses, which totaled $8,169.66 [$3,465.00 + $121.06 (for forklift battery and maintenance, respectively) + $2,307.98 + 275.80 (for barrel expenses) + $2,000 (for trailer expenses)].

liner Truck FL 70.[6] Foerster noted, however, that Dickerson final report shows that he spent $12,163.74 for the truck (4,350 for the down payment; $142.92 for property taxes; $5,033 for truck payments; $312.25 for county tags; $2,043.50 for insurance; and $282.07 for repairs).[7] Dickerson did not provide a final affidavit of expenditures or source documentation with his final report. Without providing details, Foerster expressed the opinion that many of the expenses Dickerson listed in his final report were ineligible. Foerster recommended to Bider that Dickerson should be required to file the final affidavit of expenditures and to provide source documentation; that KDHE should conduct an independent audit; and that KDHE should consider possible administrative and civil action against Dickerson. (Testimony of Kent foerster, Tape 1, Side B; KDHE Ex. A-14.)

23. In a letter dated September 29, 1997, that Foerster stated he drafted for John W. Mitchell informed Dickerson that KDHE was seeking the return of $39,216.38 in grant funds that KDHE believed Dickerson expended for purposes considered ineligible under the grant terms.

With respect to Dickerson's first affidavit of expenditures dated August 6, 1996, Mitchell informed Dickerson that KDHE considered $2,598.75 of the requested amount,

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[6]KDHE did not offer Dickerson's second affidavit of expenditures into the record. Dickerson presented no evidence to refute Foerster testimony about the second affidavit of expenditures.

[7]In reviewing KDHE Revised Ex. A-10, the presiding officer confirms Foerster's listing of the truck expenses that Dickerson submitted as part of his final report but notes that Foerster's compilation does not include the $3,000.00 expense Dickerson claimed as the trade-in value of an unidentified truck. The presiding officer could find no evidence on the record other than the unsigned letter dated September 29, 1997 (KDHE Ex. A-15), regarding KDHE's decision to disallow this expense.

$6,127.25, to be an ineligible expense. Mitchell identified the $2,598.75 expense as 75% of a promissory note to Sonny's Services.[8]

Concerning Dickerson's second affidavit of expenditures that requested $39,880.13, Mitchell identified amounts of $2,250.00 and $34,367.63 as ineligible expenses. Mitchell characterized the $2,250.00 amount as 75% of the trade-in value of a 1983 Volvo[9] and the $34,367.63 amount as 75% of a lien to Associated Commercial Corp.[10]

KDHE's position that these expenses were ineligible grant expenditures is apparently based on the fact that two of the claims were for borrowed money and that the lien-holder repossessed the 1997 Freightliner that Dickerson purchased with grant funds.

Mitchell also informed Dickerson that he could submit a new affidavit of expenditures to claim appropriate grant ex-expenses and use these expenses to offset the $39,216.38 otherwise due to KDHE. Mitchell requested that Dickerson respond within 30 days of the date of his letter. (Testimony of Kent Foerster, Tape 1, Side B and Tape 2, Side A; KDHE

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[8]The amount, $2,598.75, represent 75% of $3,465.00 according to the presiding officer's calculation. As shown in Dickerson's final report (KDHE Revised Ex. A-10), $3,465.00 is the amount Dickerson claimed as a forklift battery expense.

[9]The amount, $2,250.00, represents 75% of $3,000.00 according to the presiding officer's calculation. According to Mitchell's letter, KDHE should have disallowed the $2,250.00 amount from its payment on Dickerson's second affidavit of expenditures. *See* footnote 7.

[10]The presiding officer notes that the amount, $34,367.63, is equivalent to 75% of the purchase price of $45,823.50 that Athena Andaya identified as the remaining amount Dickerson owed on the truck he purchased from Westfall GMC Truck, Inc. *See* finding number 28, *infra*.

Ex. A-15.)[11]

24. Foerster stated that Dickerson did not respond to Mitchell's letter and that he did not hear from Dickerson again until KDHE staff convented a meeting with him in 1998. At the meeting on July 9, 1998, several KDHE staff members and Dickerson reviewed the letter of September 29, 1997, and discussed cleanup of the property and repayment of the grant money. Dickerson did not deny using grant money for legal expenses or for other purposes than the total purchase price of the truck. Dickerson did not offer to repay the grant funds but reiterated his legal struggles with Leavitt. Foerster said that Dickerson has not repaid the $39,216.38 that KDHE has demanded. (Testimony of Kent Foerster, Tape 2, Side A; Testimony of Ron Smith, Tape 2, Side B and Tape 3, Side A; KDHE Ex. C-1.)

25. By letter to Dickerson dated July 17, 1998, Ron Smith, chief of KDHE's Solid Waste Compliance and Enforcement Unit summarized the meeting of July 9, 1998, and requested that Dickerson responded to him by July 31, 1998, with any justification Dickerson had for additional allowable grant expenses and a proposal for repaying the grant amount

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[11]KDHE introduced an unsigned copy of Mitchell's letter dated September 29, 1997, into evidence accompanied by copies of a certified mail receipt, P872074781, that shows a postal service stamp dated September 8, 1997, and a copy of a return receipt signed by Durand Dickerson that shows a delivery date of September 13, 1997. Foerster testified that KDHE's copy of the original letter was lost ant that the unsigned copy is an electronic reprint of the original that he had drafted for John Mitchell's signature. Foerster explained that a computer reference located below the enclosure line at page three of the letter indicates that the letter was drafted on September 4, 1997, and printed a second time on September 29, 1997, when it was signed and mailed to Dickerson. (Testimony of Kent Foerster, Tape 2, Side A; KDHE Ex. A15.) The presiding officer, however, finds nothing in the record to tie the unsigned letter dated September 29, 1997, to the certified mail receipt dated September 8, 1997

$39,216.38. Smith stated that KDHE never received any further expense justification or repayment proposal from Dickerson. On August 3, 1998, Smith forward the matter to KDHE's legal office for further court action. (Testimony of Ron Smith, Tape 3, Side A; KDHE Ex. C-2, C-3.)

26. On or about February 25, 1999, Athena Andaya, an Assistant Attorney General in the criminal division of the Attorney General's (AG's) office, was assigned to research a referral that the office had received from Dan Riley, than employed as a staff attorney with KDHE. In Riley's referral letter, he requested that the Attorney General's office review KDHE internal investigation of Durand Dickerson and the grant award for possible criminal prosecution. (Testimony of Athena Andaya, Tape 2, Side A.)

27. Andaya requested the Kansas Bureau of Investigation (KBI) to investigate the matter and provide to her any materials uncovered in the investigation. Senior Special Agent Dana Moody investigated the Dickerson matter for KBI and provided to Andaya a copy of the KDHE file in the Dickerson grant matter and the results of his own investigation. After reviewing the investigatory materials, Andaya determined that there were two potential theft counts, one dating from August 19, 1996, and one dating from October 3, 1996. Andaya felt that the investigation established the elements of theft under K.S.A. 21-3701(a) and was sufficient to establish probable cause. She explained, however, that the Attorney General's office did not prosecute either crime because there is a two-year statute of limitations for theft.[12] (Testimony of Athena Andaya, Tape 2, Side B; KDHE Ex. B-1.)

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[12]Carla Stovall, Attorney General, offered this opinion in a letter dated July 12, 1999, in response to Dan Riley's referral request. Andaya prepared the letter for Stovall's review and signature. (Testimony of Athena Andaya, Tape 2, Side B; KDHE Ex. B-1.)

28. According to Andaya's information Dickerson filed two Affidavits of Expenditure with KDHE. The first affidavit does not spend the entire $13,102.75 that KDHE advanced to Dickerson.[13] It appeared to the AG's office that on August 19, 1996, Dickerson spent $6,000 in grant funds on a appeal bond for a civil case in Leavenworth County District Court, Case No. 9608 LC 006978.

With the second affidavit Dickerson provided an invoice dated August 9, 1996, from Westfall GMC Truck, Inc. For the purchase of a truck, which showed that the expense was for a cash down payment of $4,350. The invoice showed that Dickerson owed the remaining amount of $45,823.50 for the truck. The AG opined that through the oversight of KDHE staff, KDHE erred in issuing the second grant check of $32,902.63 because Dickerson had not expended that amount. On October 3, 1996, Dickerson cashed the second grant check and did not apply the proceeds to the purchase of a truck that he was supposed to purchase. According to Andaya's information, Dickerson used the money instead to pay legal expenses related to five civil cases pending against him. (Testimony of Athena Andaya, Tape 2, Side B; KDHE Ex. B-1.)

29. Paul Leavitt owner of 1500 South 2nd, Leavenworth, Kansas, the location of Dickerson's first recycling facility, acknowledged that he had been involved in litigation with Dickerson over unpaid rent and that the legal action resulted in Dickerson's eviction from the property, leaving Leavitt with a building and lot filled with paper. About eight months after the eviction, the judge permitted Leavitt to remove the paper from the property. Leavitt placed liens on some of Dickerson's equipment, but he did not believe that any of the equipment was seized by the sheriff. Leavitt thought that the judge required Dickerson to put

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[13]The record reflects that Dickerson's first affidavit of expenditures sought $6,127.25 in grant funds. (KDHE Ex. A-14.)

up appeals bonds. (Testimony of Paul Leavitt, Tape 2, Side B.)

30. Leavitt stated that the paper stacked outside the building was there for over a year and that Dickerson had stacked the paper outside because the building was filled with paper for recycling. Leavitt had requested Dickerson to remove the paper about eight months before Leavitt actually removed it from the property. Leavitt contacted a paper company in Kansas City to evaluate the paper; this company determined that except for one load, the paper was not suitable for recycling because it was wet and had staples in it. Leavitt believed that he spent about $3800 to have the paper removed from the facility, most of which was removed to a landfill in Easton, Kansas. Leavitt stated that Dickerson did remove some of the paper from the facility after the eviction before the judge permitted Leavitt to remove the remainder. (Testimony of Paul Leavitt, Tape 2, Side B.)

31. Ron Smith, chief of KDHE's Compliance and Enforcement Unit for the solid waste program, became involved in KDHE's investigation of Dickerson when Foerster requested the assistance of a member of Smith's staff. Smith assigned Minta Rumsey to assist Foerster and later reviewed the investigative report (KDHE Ex. A-8) and pictures (KDHE Ex. A-9) that Foerster and Rumsey prepared. Smith opined that the paper had become solid waste because it appeared to have been wet and was decomposing and had, therefore, lost its value as a recyclable paper product. Smith viewed the stacks of paper as an act of open dumping because Dickerson did not have a landfill permit. Smith considered Dickerson to have abandoned the property and stated that Dickerson's eviction would not change his analysis of the situation because Dickerson had an obligation to remove the paper from the property. Smith explained that KDHE was seeking to assess a $5,000 civil penalty against Dickerson based on the minimum one-day penalty amount set out in the penalty statute, K.S.A. 65-3419, Smith considered Dickerson's violation to be a multi-day violation; he believes the proposed $5,000

penalty to be a lenient one under the circumstances. (Testimony of Ron Smith, Tape 2, Side B and Tape 3, Side A.)

32. KDHE staff prepared an administrative order to initiate this administrative action. The order was issued on February 28, 2000. Smith explained that the delay from his memorandum of August 3, 1998, to the issuance of the administrative order on February 28, 2000, was somewhat unusual. He explained the delay as being due, at least in part to the decision of KDHE legal staff to pursue an inquiry to the Attorney General's office. (Testimony of Ron Smith, Tape 3, Side A).

33. Dickerson presented no witnesses or exhibits in this proceeding.

34. The presiding officer finds that Dickerson expended grant funds in the amount of $39,216.38 for expenses that were ineligible for reimbursement under the terms of his grant agreement with KDHE.

35. The presiding officer finds that Dickerson failed to remove paper he collected for recycling and stored outside on the premises of 1500 South 2nd , Leavenworth, Kansas, the former location of his recycling business, thereby subjecting the paper to adverse weather conditions that resulted in the loss of its value as a recyclable.

CONCLUSION OF LAW

1. Introduction. This proceeding stems from Dickerson's appeal of an administrative order that asserts two claims: (1) that Dickerson violated the terms and conditions of the solid waste grant agreement when he used grant proceeds to fund ineligible projects expenses and (2) that Dickerson violated K.S.A. 65-3409(a)(1) and (a)(5) when he openly dumped and improperly stored solid waste at the former location of his recycling facility.

With respect to the grant funds, the order seeks recoupment of $39,216.38 under the authority of K.S.A. 65-3415 and 65-3415(a). With respect to the waste storage claim, the order pro-

poses to assess a $5,000 civil penalty against Dickerson under K.S.A. 65-3419.

2. Jurisdictional challenge. Throughout this administrative proceeding and through interlocutory appeals to the Shawnee County District Court, the Kansas Court of Appeals, and apparently the Kansas Supreme Court,[14] Dickerson has maintained the position that the presiding officer does not have jurisdiction to hear the grant claim issue because K.S.A. 65-3415 and 65-3415a, as in effect on February 28, 2000, did not provide that KDHE could seek repayment of grant funds nor did either statute authorize a KAPA hearing to determine the same. *See* Dickerson Recycling Brief in Support, filed in this matter on May 22, 2000. Dickerson has not challenged KDHE's authority with respect to the alleged solid waste violation/civil penalty claim.

3. Legislature scheme. It is the policy of the state of Kansas to establish and maintain a cooperative state and local program for comprehensive solid waste management, to utilize the capabilities of private enterprise to effectively manage solid waste, to develop strategies that reduce, reuse and recycle material. K.S.A. 65-3401(1997). To further these policies, the Kansas legislature has given KDHE express authority to "adopt suitable measures.... to encourage recovery and recycling of solid waste for reuse whenever feasible." K.S.A. 65-3406(a)(1997). More specifically, the Kansas legislature has expressly delegated to the Secretary of KDHE the authority to administer "competitive

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[14]On or about May 21, 2001, Dickerson delivered to KDHE's Administrative Appeals Section a copy of a document captioned "In the Court of Appeals of the State of Kansas" and titled, "Appellant's Petition for Discretionary Review." The document, however, bears no file stamp and its certificate of service does not show that it was filed with the Kansas Supreme Court. The presiding officer finds that she has received no order from any court that stays this administrative proceeding.

grants that pay up to 75% of eligible cost incurred" by private entities "for any project related to the development and operation of recycling ... programs, such as Dickerson Recycling Center. K.S.A. 65-3415(b)(1997). To be eligible for competitive grants, the private entity "must be implementing a project with statewide significance as determined by the secretary with the advice and counsel of the solid waste grants advisory committee."*id.* Created in part to fund these competitive grants, the legislature established the solid waste management fund and expressed its intent that the fund is to "remain intact and inviolate for the purposes set forth in this act...." K.S.A. 65-3415a (c), (g) (1997).

4. Grant contract. In recognition of KDHE's authority to award competitive grants, Dickerson availed himself of the opportunity to submit a grant application for his recycling center and entered into a grant agreement with KDHE for the amount of $52,411.50, which KDHE had reduced from Dickerson's requested amount of $205,573.50. Dickerson agreed to "perform the activities according to the grant proposal as approved by KDHE ...." KDHE Ex. A4, & ll.(l). (Emphasis added.) Dickerson further agreed that he would submitt reimbursement request for expenditures "only for items agreed to in the grant proposal as approved by KDHE." *Id.* at & ll. (2). The grant contract incorporated by reference the grant proposal and KDHE's notification letter to Dickerson and included KDHE's reservation of the right to disallow any expenditures upon review. The grant contract further required Dickerson to submit reports and affidavits of expenditures. *Id.* at & lll. (4).

5. District court decision. Explicit in the solid waste statutory scheme is the Secretary's authority and obligation to administer competitive grants that pay up to 75% of the eligible costs incurred by the private entity and to assure that the solid waste management fund is uses for the purposes established in the solid waste act. As the District Court observe "the grant of

power ... to an agency to accomplish a purpose necessarily carries with it all the reasonably necessary implied subordinate power to effectuate the authory provided. See, *The State, ex rel. vs. Davis,* 114 Kan. 283, 289-290 (1923)." Memorandum Opin ion at 6-7. The Court characterized KDHE's administrative order seeking repayment of grant funds as "agency action" under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, specifically K.S.A. 77-602(b)(3), "an agency's performance of, or failure to perform, any other duty, function or activity, discretionary or otherwise." Memorandum Opinion at 8

Contrary to Dickerson contention that KDHE does not have authority to determine the grant repayment claim, the District Court found that K.S.A. 65-3415 or 65-3415a grant authority to KDHE to administer competitive grants and that authority includes the authority to determine whether the grant terms have been fulfilled. Whether either K.S.A. 65-3415 or 65-3415a provides for a KAPA hearing is not particularly relevant because the District Court considered KDHE's administrative order to be agency action as defined by the Kansas Act for Judicial Review and because KDHE has a rule in place, K.A.R. 28-3-7, for non-KAPA hearings. *See* Memorandum Opinion at 6-9.

6. Conclusion. As the District Court found, it is a "fundamental aspect of governmental power... to see that its laws and their purposes are fulfilled. *State, ex rel. vs. Basham,* 146 Kan. 181, 185-186 (1937)" Memorandum Opinion at 7. The Kansas legislature has explicitly imposed duties on the Secretary of KDHE to administer competitive grants and to manage the solid waste management fund. Whether the Secretary performs or fails to perform these duties, his action or inaction is subject to review under the Kansas Act for Judicial Review, which favors the exhaustion of administrative remedies before the agency. *See* K.S.A. 77-612 and cases cited thereunder. Although neither K.S.A. 65-3415 nor 65-3415a provides for a hearing before the agency regarding grant repayment claims, the law in Kansas sup-

ports KDHE's authority to take actions reasonably necessary to fulfill its obligations. To this end, KDHE issued to Dickerson the administrative order in this case and offered him the opportunity for a due process hearing before the agency on the allegations asserted therein.

7. Jurisdiction. The presiding officer thus finds she has jurisdiction over the grant repayment claim asserted in this proceeding under the provisions of K.S.A. 65-3415 and 65-3415a, K.A.R. 28-3-7, and according to the decision of the Shawnee County District Court in Case No. 00C827 issued on January 4, 2001, an appeal of which the Kansas Court of Appeals rejected by order issued on April 20, 2001.

The presiding officer finds she has jurisdiction over the solid waste violation/civil penalty claim asserted in this proceeding under K.S.A. 65-3419, which specifies that the Kansas Administrative Procedure Act applies to proceedings involving a penalty assessment for violation of K.S.A. 65-3409(a). K.S.A. 65-3419 gives the Secretary of KDHE discretion to assess a penalty of up to $5,000 per day when a person violates any provision of K.S.A. 65-3409(a).

8. Burden of proof. In order for KDHE to prevail on its claim seeking the repayment of grant funds, it must prove, by preponderance of evidence, that Dickerson violated the terms of the grant contract and expended grant funds for purposes that KDHE had not approved or determined to be ineligible. In order for a civil penalty to be assessed against Dickerson under K.S.A. 65-3419, KDHE must prove, by preponderance of the evidence, that Dickerson violated a provision of K.S.A. 65-3409(a).

9. Grant repayment. The unrefuted evidence shows that Dickerson received a total of $46,007.38 in grant funds from KDHE in two increments, $13,102.75 in May 1996 (the 25% advance under the contract) and $32,904.63 in October 1996. According to testimony from Athena Andaya, on August 9, 1996, Dickerson submitted two affidavits of expenditures to KDHE,

one requesting $6,127.25 that KDHE applied to the advanced funds, leaving an balance of $6,975.50 and one requesting $39,880.13, which included a receipt for the purchase of a truck that showed only that a down payment was made on the truck.

In October 1996, KDHE awarded an aditional $32,904.63 ($39,880.13 - $6,975.50) in grant funds to Dickerson which, according to the Attorney General, Dickerson apparently did not apply toward the purchase of the truck. According to Kent Foerster's testimony, the truck was later repossessed. This fact is further supported by Dickerson's final report that shows he made three payments of $1,011.00 each to Associates Finance on October 15, November 15, and December 15, 1996, respectively, and one payment of $2,000.00 to Associates Finance on February 15, 1997, and further shows a listing of truck rental expenses for the period between April 23, 1997, and June 3, 1997.

KDHE further presented evidence of the conclusion reached by the Attorney General that Dickerson used $6,000 to pay for an appeal bond, which is further supported by Dickerson's final report in which he admitted to diverting $18,128.90 in grant funds to cover legal expenses, including the amount of $6,055.00 for a "supercedious" bond on October 6, 1996.

During its audit of Dickerson's grant, KDHE staff apparently determined that the expense Dickerson listed as $3,465.00 for a forklift battery was a promissory note to Sonny's Service because Mitchell's demand letter excludes $2,598.75 (75% of $3,465.00) from Dickerson's first affidavit of expenditures. The demand letter further excluded from Dickerson's second affidavit of expenditures $2,250.00 [75% of $3,000.00 (for the trade-in allowance)] and $34,367.63 [75% of $45,823.50 (for the remaining purchase price of the truck)]. Mitchell explained that KDHE was excluding these amounts as ineligible costs because Dickerson was claiming reimbursement for expenses that he paid with borrowed purchase money.

The record reflects that KDHE gave Dickerson an opportunity to respond to its demand letter and to offset the repayment amount with eligible expenses supported by vendor invoices and conceled checks. After Dickerson did not respond, KDHE staff convened a meeting with Dickerson to discuss the points raised in the demand letter and how Dickerson planned to address them. Dickerson did not deny using grant money for ineligible expenses nor did he offer to repay the misspent funds. Following the meeting, KDHE again offered Dickerson an opportunity to offset the repayment amount, and again, received no response from Dickerson.

In signing the grant agreement, Dickerson accepted its terms, including the reduced grant amount and the limitations for which the grant funds could be used, as specified in KDHE's notification letter. KDHE's letter informed Dickerson that his grant award excluded the salary, travel, supplies, professional services, advertising and training expenses he submitted in his grant proposal. The letter also excluded some of Dickerson's proposed capital equipment expenditures. The end result was that Dickerson's grant was awarded for the purchase of approved capital equipment.

One of the grant terms reserves to KDHE "the right to disallow any expenditures upon review" and requires Dickerson to submit reports and affidavits of expenditures of "revised, actual expenditures." KDHE Ex. A-4. & lll. (4). Dickerson should have known that in purchasing capital equipment with borrowed funds that he could only submit request for reimbursement for expenses he actually incurred in purchasing the truck, i.e., the down payment and installment payments. Instead, Dickerson submitted a reimbursement request for the remaining unpaid loan balance, which KDHE mistakenly honored as an eligible cost whit it issued the second grant check to Dickerson.

Dickerson appealed from KDHE's administrative order and was granted an administrative hearing in which he elected not to present any evidence or state his position on the merits of KDHE's claims against him. Despite some minor inconsistencies in KDHE's documentary evidence, particularly the unsigned copy of John Mitchell's demand letter dated September 29, 1997, the presiding officer finds and concludes that the testimony of Kent Foerster, Athena Andaya, and Ron Smith corroborates the evidence in the letter.

The presiding offices further finds and concludes that KDHE proved, by a preponderance of th evidence, that Durand Dickerson violated the terms of his grant agreement with KDHE when he requested reimbursement for loaned amounts on which he later defaulted, losing possession of the capital equipment he had been authorized to purchase with the grant funds. The presiding officer further finds and concludes that Durand Dickerson further violated the terms of his grant agreement when he then used the grant funds to offset legal expenses arising out of the dispute with his landlord, Paul Leavitt. As a result, the presiding officer finds that Dickerson should be required to repay $39,216.38 to the solid waste management fund manage by KDHE.

10. Solid waste violation/civil penalty. There is no dispute that Dickerson conducted a paper recycling business at 1500 South 2nd , Leavenworth, Kansas, from December 1995 until February 28, 1997, when Dickerson was evicted from the property. The evidence is unrefuted that Dickerson left stacks of paper and other recycling materials outside on the lot for a lengthy period of time, subjecting them to the elements and causing deterioration to the extent that the paper was no longer acceptable for recycling. Paul Leavitt acknowledged that Dickerson removed some of the paper, but Leavitt also testified that he spent about $3,800.00 to

remove most of the paper from the property to a landfill.

KDHE contends that these facts support a finding that Dickerson violated K.S.A. 65-3409, which makes it unlawful under subsection (a)(1) to dispose of any solid waste by open dumping and, under subsection(a)(5), to store solid waste contrary to the rules and regulations, standards or orders of the secretary or in such manner as to create a public nuisance.[15]

K.S.A. 65-3402(a) defines solid waste to mean garbage, refuse and other discarded materials. The definition specifically excludes recyclables, which are any materials that will be used or reused either as an ingredient in an industrial process or as an effective substitute for a commercial product. *See* K.S.A. 65-3402(r). "Open dumping" is the disposal of solid waste at an unpermitted solid waste disposal area or facility.

According to the evidence in the record, Dickerson had an opportunity to remove paper from 1500 South 2nd and removed some but not all of the paper. By the time of the KDHE inspection on June 26, 1997, the paper was no longer able to be used or reused. As a result, the presiding officer concludes that the paper was no longer a recyclable and could be considered to be a solid waste since Dickerson appeared to have abandoned it. By failing to take action to remove the paper from the former site of his recycling facility, which was not a permitted solid waste facility, Dickerson effectively dumped and stored solid waste contrary to the solid waste laws and regulations in Kansas. As a result, the presiding officer concludes that a preponderance of the evidence support a finding that Dickerson violated K.S.A.

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[15]The presiding officer has reviewed the legislative history for K.S.A. 65-3409 and has found that subsection (a)(1) and (5) have been in effect in their current form since they were last amended in 1981.

65-3409(a)(1) and (5) and should be punished by a civil penalty of $5,000 as provided in K.S.A. 65-3419. The presiding officer finds and concludes that a $5,000 civil penalty is an actual and substantial economic deterrent for these solid waste violations.

11. Procedural question. The District Court raised a procedural question as to whether KDHE's demand letter dated September 29, 1997, (KDHE Ex. A-15) was agency action on which KDHE could have sought redress under the Kansas Act for Judicial Review when Dickerson did not appeal. KDHE also raised this question in its closing argument.

K.S.A. 77-602 includes "an order" within the definition of "agency action." Subsection (b)(1). The statute further defines "order" to mean an agency action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interests of one or more specific persons." Subsection (e).

The evidence shows that KDHE's demand letter was issued by an agency staff member (not the Secretary or the Secretary's usual designee for environmental matters, the Director of the Division of Environment); other than a general reference to the grant contract, the letter does not state any legal basis for KDHE's position on its grant repayment claim and does not refer at all to a possible civil penalty claim no does it provide any statement of legal rights that Dickerson may have in the matter. The evidence further shows that even after receiving no response from Dickerson to the demand letter, KDHE staff continued efforts to negotiate settlement with Dickerson in July 1998 when staff provided an additional opportunity to Dickerson to respond to KDHE's demand for repayment. Under these circumstances, the presiding officer finds and concludes that KDHE's demand letter was not an order and, therefore, not agency action for review under the Kansas Act for Judicial Review.

IT IS THEREFORE ORDERED that Durand Dickerson shall repay to the solid waste management fund $39,216.38 in solid waste grant funds that he spent for ineligible project cost and that Durand Dickerson shall be assessed a civil penalty of $5,000 for violating K.S.A. 65-3409(a)(1) and (5). These amounts shall be paid within thirty (30) days of the date of service of this Initial Order by cashier's check or money order, to the Kansas Department of Health and Environment, Office of Legal Services, Capitol Tower - Suite 203, 400 SW Eight Street, Topeka, Kansas 66603-3930.

NOTICE OF RIGHT TO APPEAL

The available procedures and time limitations for seeking review or other administrative relief are as follows:

1. The Secretary of the Kansas Department of Health and Environment may review this Report of Presiding Officer and Initial Order upon his own motion by providing the parties written notice within fifteen (15) days after service of this Report of Presiding Officer and Initial Order. K.S.A. 77-527.

2. Either party may request the Secretary of the Kansas Department of Health and Environment to review this Report of the Presiding Officer and Initial Order by filing a Petition for Review with Clyde D. Graeber, Secretary, Kansas Department of Health and Environment, Capitol Tower, Suite 200, 400 SW Eighth Street, Topeka, KS 66603-3930, within fifteen (15) days after service of this Report of Presiding Officer and Initial Order. K.S.A. 77-527.

3. If this Report of Presiding Officer and Initial Order is served by mail, three (3) days are added to the time limits set out above. K.S.A. 77-531.

4. Unless a later date is stated in this order or a stay is granted, this Report of Presiding Officer and Initial Order will become effective and will become the Final Order thirty (30) days after service if no party has timely filed a petition for review by the Secretary or the Secretary has not given written notice of his intention to exercise review. K.S.A. 77-530.

IT IS SO ORDERED

Dated this 7th day of June 2001.

"s/ Shari Feist Albrecht"

Shari Feist Albrecht, J.D.
Presiding Officer

Administrative Appeals Section
Kansas Department of Health and Environment
Capitol Tower - Suite 201
400 SW Eighth Street
Topeka, Kansas 66603
(785) 296-1291

APPENDIX-B

IN THE DISTRICT COURT OF SHAWNEE COUNTY,
KANSAS DIVISION SEVEN

DURAND DICKERSON,
Petitioner, Case No. 01C777

vs.

...BY CLERK
...S. DISTRICT COURT
...IRD JUDICIAL DIS
2002 DEC -5 P 2:

STATE OF KANSAS,
DEPARTMENT OF HEALTH
AND ENVIRONMENT,
Respondent.

MEMORANDUM OPINION AND ENTRY OF JUDGMENT

NATURE OF THE CASE:

This is an appeal pursuant to the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601, et seq. From a decision of the Kansas Department of Health and Environment finding that Petitioner, Durand Dickerson, d/b/a/ Dickerson Recycling, as the grantee under a contract with the Department, was liable to repay $39,216.38 to the agency based on his failure to provide proof of qualifying expenditures for such sum from a total of $46,007.38 in grant funds advanced to him under his solid waste disposal grant with the Department.

A companion issue, also subject of this appeal, concerning a fine imposed upon him for violation of the solid waste management act has previously been determined, under an opinion of this Court filed July 11, 2002, as not subject to review in these proceedings because of Mr. Dickerson's failure to exhaust his administrative remedies with the agency.

Accordingly, this memorandum opinion only deals with the grant recoupment issue.

The Court would incorporate for the purpose of this opinion and the entry of judgment following, its Memorandum Opinion and Order of July 11, 2002, and, as well, the previous decision of this Court in Shawnee County District Court Case No. 00C827, wherein the Court found Mr. Dickerson's petition for interlocutory review and an injunction on the very issues raised now in this appeal should be dismissed. The case background and procedural history, as detailed in those opinions, are incorporated, but not repeated, here.

FINDING OF FACT:

The Petitioner does not challenge the factual and legal findings of the agency's administrative hearing officer no does he challenge the legal conclusions reached. Mr. Dickerson's sole assault, beginning in 00C827 and throughout the course of his petition in this case, is on questioning the agency's authority to act upon the matter before it, particularly, the agency's ability to administratively adjudicate the grant recoupment issue. Nevertheless, the admissions made by Mr. Dickerson concerning the underlying facts, all as reflected by the exhibits admitted at the administrative hearing and which concern the manner in which he expended the grant monies which he admittedly received, leaves no room for any quibble as to their authenticity or veracity and, accordingly this documentary evidence, coupled with the admissions, fully support the hearing officer's conclusion as to Mr. Dickerson's liability under his agreement with the agency to repay the $39,216.38 in issue.

CONCLUSION OF LAW:

As noted, Mr. Dickerson's challenge is to the agency's power to act on the issues before it. The Court concluded in its July 11, 2002, opinion, for the reasons therein stated, that the agency had jurisdiction of all issues. Nothing presented by way of the agency record before the Court nor by Mr. Dickerson gives the Court a basis to retreat from this holding and the Court reaffirms its holdings of July 11, 2002, in this regard.

After that ruling, the Court gave the parties the opportunity to submit any additional briefing desired on the merits of the appeal regarding the recoupment issue. As noted, the Petitioner principally reasserted his jurisdictional due process issues and contested again the Court's opinion concerning his failure to exhaust his administrative remedies in regard to the fine imposed for violation of the solid waste act. Mr. Dickerson filed a motion to compel discovery, but the Court finds it has no place in this proceeding and is without adequate statutory merit.

From a review of the record and a comparison of it with the hearing officer's findings, the Court would adopt and affirm the hearing officer's conclusions on the merits of the appeal on the recoupment issue. The adjudicatory procedure used was lawful and the result factually and legally appropiate. The Petitioner has failed to demonstrate any error either of jurisdiction, procedure, fact, or law that would be grounds to overturn the agency's findings. Accordingly, the decision of the Kansas Department of Health and Environment finding and order that $39,216.38 is due and owing from the Petitioner to the agency is affirmed.

Further, the Court's decision of July 11, 2002, finding the Petitioner failed to confer jurisdiction in this Court to review the agency's finding concerning his violation of the Kansas

solid waste act and the imposition of a fine because he failed to exhaust his administrative remedies with the agency is affirmed for the reasons therein stated.

Further, the Court reaffirms all its findings establishing authority in the agency to act on the matters before it concerning the Petitioner, hereby incorporating its opinion of July 11, 2002, in this case and also its opinion of January 4, 2001, in case No. 00C827 on the issues presented.

Lastly, Petitioner's motion to compel discovery is denied and the Respondent's request for attorneys fees for responding is denied.

ENTRY OF JUDGMENT

Judgment is entered for the Respondent, Kansas Department of Health and Environment, and against the Petitioner, Durand Dickerson, d/b/a/ Dickerson Recycling, for the reasons stated in the foregoing Memorandum Opinion, and for the reasons stated in the Court's July 11, 2002, Memorandum, and for the reasons stated in its January 4, 2001, Memorandum Opinion in 00C827. Costs is taxes to the Petitioner.

Plaintiff's motion to compel discovery is denied and Respondent's motion for attorney fees is denied.

This entry of judgment shall be effective when filed with the Clerk of this Court and no further journal entry is required.

IT IS SO ORDER this 5th day of December, 2002.

"s/ [signature] "

Franklin R. Theis
District Court Judge
Division Seven

APPENDIX-C
KANSAS COURT OF APPEALS OPINION

NOT DESIGNATED FOR PUBLICATION

No. 90,263

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DURAND DICKERSON
Appellant,

v.

STATE OF KANSAS, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellees.

MEMORANDUM OPINION

Appeal from the Shawnee District Court; FRANKLIN R. THEIS, judge. Opinion filed December 19, 2003. Affirmed.

Durand Dickerson, appellant pro se.

William L. Anderson, of Topeka, for appellees.

Before GREENE, P.J., LEWIS and MALONE, JJ.

Per Curiam: Durand Dickerson appeals the district court's order upholding agency action of the Kansas Department of Health and Environment (KDHE). The case raises issues of failure to exhaust administrative remedies and subject matter jurisdiction. We affirm.

The facts are largely undisputed. In December 1995,

Dickerson applied to KDHE for a solid waste grant, requesting $205,573.50 in state funding to commence a recycling facility. KDHE and Dickerson, as an authorized representative of Dickerson Recycling Center, entered into a grant contract for a reduced amount of $52,411.50 for a period from April 1, 1996, through June 30, 1997. The parties agreed there would be flexibility in the use of funds provided all expenses were approved by KDHE. Dickerson agreed to submit reports and affidavits of expenditures.

In April 1997, Kent Foerster, chief of KDHE's planning, grants, and public education unit, received a telephone call from Paul Leavitt, owner of the property in Leavenworth where Dickerson Recycling Center was located. Leavitt complained Dickerson had not paid rent for several months and had left stacks of paper outside the property which were no longer acceptable for recycling. Foerster talked to Dickerson about Leavitt's complaints. Dickerson explained he was struggling financially because of numerous legal entanglements with Leavitt.

In June 1997, Foerster and Minta Rumsey, an employee of KDHE's solid waste compliance and enforcement unit, inspected the recycling facility in Leavenworth. They found stacks of paper with water damage and staining which were not acceptable for recycling. Foerster and Rumsey went to a new facility in a different location and observed that Dickerson continued to collect materials and appeared to be in business. Dickerson told them that Leavitt evicted him from his previous location, and Leavitt left the paper material outside the other facility in an attempt to put Dickerson out of business. Dickerson stated the truck he purchased with the grant money was repossessed, but he was trying to get it back.

In a July 30, 1997, letter to KDHE, Dickerson admitted he diverted state funds without KDHE approval to try to stay in business. Specifically, he used state funds to pay civil bond

amounts in four or five legal actions taken against him. Dickerson's final report showed he received grant funds totaling $46,007.38. After considering which of Dickerson's submitted expenditures were eligible under the grant term, KDHE informed Dickerson it was seeking the return of $39,216.38 in grant funds.

After KDHE received no response from Dickerson, it referred Dickerson's investigation to the Attorney General's office. The assistant attorney general determined there were two potential theft charges based on the criminal investigation of Dickerson by the KBI. However, the 2-year statute of limitations barred the prosecution.

On February 28, 2000, KDHE issued an administrative order to Dickerson demanding the return of $39,216.38 grant money and a civil penalty of $5,000. Dickerson requested a hearing, and a prehearing telephone conference was held. Dickerson filed a petition in the Shawnee County District Court seeking to enjoin KDHE from proceeding further. However, the court ruled this action was premature and denied the injunctive relief. Dickerson's appeal of this decision to the Court of Appeals was also dimissed for failure to exhaust administrative remedies.

On April 17, 2001, a hearing was held before a presiding officer of KDHE. KDHE presented evidence showing Dickerson expended grant funds in the amount of $39,216.38 for expenses that were ineligible for reimbursement under the grant agreement. Dickerson did not present witnesses or exhibits to rebut KDHE's evidence. On June 7, 2001, the hearing officer issued an initial order affirming the $39,216.38 grant recoupment and the $5,000 civil penalty. The order informed Dickerson of his right to appeal to the Secretaty of KDHE within 15 days.

Instead of filing a notice of appeal to the Secretary, Dickerson again filed a petition for review with Shawnee County

District Court on July 9. 2001. Dickerson argued the district court had jurisdiction to hear the contractual issues concerning the grant money and his due process rights were violated by the KDHE hearing proceedings. In September 2001, KDHE filed a motion to dismiss, arguing Dickerson failed to exhaust his administrative remedies before the agency by failing to seek review of the hearing officer's opinion by the Secretary.

On July 11, 2002, the district court filed a memorandum opinion, finding that Dickerson failed to exhaust his administrative remedies on the $5,000 civil penalty and that his appeal to district court on that issue was dismissed. However the court found that Dickerson was entitled to judicial review of the order to return the grant money, and the court requested the parties to file additional briefs.

On December 5, 2002, the district court filed another memorandum opinion, finding KDHE had jurisdiction to order repayment of the grant money. The court upheld the KDHE order requiring Dickerson to repay the grant money in the amount of $39,216.38

Dickerson filed a timely notice of appeal.

Dickerson asks the court to remand the case for a full and fair hearing on the $5,000 civil penalty. He further requests that the KDHE order for return of the grant money be vacated due to the agency's lack of subject matter jurisdiction to enter the order.

Whether a party is required to or has failed to exhaust its administrative remedies is a question of law over which the appellate court's review is unlimited. *Miller v. Kansas Dept. of S.R.S.*, 275 Kan. 349, 353, 64 P3d 395 (2003). The interpretation of a statue is a question of law, and the appellate court's review is also unlimited. *Williamson v. City of Hays*, 275 Kan. 300, 305, 64 P3d 364 (2003). The interpretation of a statute by an administrative agency charged with the

responsibility of enforcing that statute is entitled to judicial deference. Furthermore, if there is a rational basis for the agency's interpretation, it should be upheld on judicial review. *GT, Kansas, L.L.C. v. Riley County Register of Deeds,* 271 Kan. 311, 317, 22 P3d 600 (2001).

The hearing officer imposed a $5,000 civil penalty on Dickerson for violation of K.S.A. 65-3409(a)(1) and (5). Under the Kansas Administrative Procedure Act, K.S.A. 77-501 *et seq.*, an order issued by a presiding officer may be reviewed by the agency head. Request for review by the agency head must be filed within 15 days after service of the initial order by the hearing officer. K.S.A. 77-527. If there is no request for review, the initial order of the hearing officer becomes final. K.S.A. 77-526(b).

Here, Dickerson failed to appeal the $5,000 civil penalty to the Secretary of KDHE within 15 days after service of the initial order by the hearing officer. A petition for judicial review of an agency action may be filed only after all administrative remedies available with the agency have been exhausted. *Turner & Boisseau, Chtd. V. Kansas Bd of Healing Arts,* 26 Kan. App. 2d 36, 39, 978 P.2d 288 (1998). Since Dickerson failed to exhaust his administrative remedies regarding the civil penalty, the district court lacked jurisdiction to review the issue. Accordingly, the district court did not err in dismissing Dickerson's appeal of the civil penalty.

The district court correctly determined that the KDHE order for repayment of the grant money was subject to judicial review, since Dickerson was challenging the KDHE's subject matter jurisdiction to enter the order. Accordingly, we will review the merits of Dickerson's arguments on this issue.

K.S.A. 65-3415(g) provides:

"If the secretary determines that a grant recipient has utilized grant moneys for purposes not authorized in the grant contract, the secretary may order the repayment of such moneys and cancel any remaining department commitments under the grant. If the grant recipient fails to comply with the secretary's order, the secretary may initiate a civil action in district court to recover any unapproved expenditures, including administrative and legal expenses incurred to pursue such action. Recovered grant moneys, or expenses shall be remitted to the state treasurer, who shall deposit the entire amount in the state treasury and credit it to the solid waste management fund."

Thus, KDHE is granted statutory authority to order the repayment of misused grant money. This provision, enacted in 2000, adopts a specific procedure for the Secretary to order repayment of misused grant money and to initiate a civil action in district court if the grant recipient fails to comply.

Dickerson argues KDHE lacked jurisdiction to hear the issue on repayment of grant money because K.S.A. 65-3415 (g) was enacted in 2000 and KDHE initiated proceedings against Dickerson before the amendment became effective. According to Dickerson, the applicable statute is K.S.A. 65-3414, which provides: "The county or district attorney of every county is hereby authorized and directed to file appropriate actions for the enforcement of this act. The county or district attorney filing the action shall notify the secretary before filing the action."

Dickerson fails to recognize that K.S.A. 65-3415(g) does not grant the Secretary any additional right or power which did no exist prior to 2000. Instead, the provision reaffirms the Secretary's previous general authority to administer grant funds pursuant to K.S.A. 1996 Supp.65-3415(b) and to initiate civil enforcement if necessary pursuant to K.S.A. 77-624 *et seq.* K.S.A. 65-3414, which authorizes the county or

district attorney to file an action for enforcement of the act, was not repealed after the 2000 amendment to K.S.A. 65-3415, adding subsection (g). Instead, the county or district attorney and the Secretary are granted concurrent statutory authority to enforce the act. However, these same rights existed prior to 2000.

Dickerson argues that application of K.S.A. 65-3415(g) to his case constitutes an ex post facto violation. This argument is without merit. The ex post facto clause of the constitution only applies to criminal proceedings. K.S.A. 65-3425(g) does not involve a criminal act, nor does it increase the punishment for a crime. See *City of Norton v. Hunt,* 275 Kan. 521, 522, 66 P.3d 870 (2003).

Although the general rule is that a statute operates prospectively unless the language clearly indicates the legislature intended othwise, an exception is recognized where a statuttory change is procedural. *Southwestern Bell Tel. Co. v. Kansas Corporation Comm'n,* 29 Kan. App. 2d 414, 420, 29 P.3d 424 (2001). K.S.A. 65-3415(g) is procedural and not substantive and, accordingly, it applies to Dickerson's case.

In, conclusion, KDHE had subject matter jurisdiction over the recoupment issue based upon specific statutory authority. Accordingly, the district court did not err in upholding the KDHE order requiring Dickerson to return the grant money in the amount of $39,216.38.

Affirmed.

APPENDIX-D
KANSAS SUPREME COURT DENIAL ORDER

SUPREME COURT ORDER DISTRICT CASE NO. 01C777 SN

IN THE SUPREME COURT
OF THE STATE OF KANSAS

DURAND DICKERSON PRO SE
1514 10TH AVE
LEAVENWORTH, KS 66048 CASE NO. 03-90263-A

DURAND DICKERSON APPELLANT,

V.

STATE OF KANSAS,
KANSAS DEPARTMENT OF
HEALTH AND ENVIRONMENT APPELLEES,

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY DURAND DICKERSON.

CONSIDERED BY THE COURT AND DENIED.

RESPONSE NOTED.

KS DEPT OF HEALTH & ENVIRONMENT CASE NO. 00-E-0039

DATED: 03/30/2004

CAROL G. GREEN
CLERK

APPENDIX-E
U.S. CONSTITUTION: FIFTH AMENDMENT

Fifth Amendment-Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F
U.S. CONSTITUTION: FOURTEENTH AMENDMENT

SECTION 1. All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

APPENDIX-G

ARTICLE 1, SECTION 10, CLAUSE 1
TREATIES AND MONEY

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

APPENDIX-H

STATE OF KANSAS, BEFORE THE KANSAS
DEPARTMENT OF HEALTH AND ENVIRONMENT

In the Matter of the Violation of
Provision of K.S.A. 65-3401 et seq. by
Durand Dickerson, individual and d/b/a
Dickerson Recycling
1514 10th Avenue
Leavenworth, Kansas 66048

DICKERSON RECYCLING BRIEF IN SUPPORT
PURSUANT TO SHOW CAUSE FROM THE
ORDER ON 4-18-2000

The Kansas Department of Health and Environment, (hereinafter KDHE) allege in their pleadings that Dickerson Recycling misused grant funds in the total of $39,216.38.

Further the allegations set forth that K.S.A. 65-3415 and 65-3415(a) 1999 Supp. Gives it ant this Tribunal authority to hear and adjudicate this matter.

K.S.A. 65-3415 and 65-3415(a) are specifically titled "Solid Waste Grants" 3415 supra "Solid Waste Management Funds" 3415(a) supra. It is clear from a reading of both section quoted by KDHE that neither one of these sections gives the Kansas Administration Procedure Act jurisdiction to hear and adjudicate the allegations set forth by KDHE, nor does it give KDHE authority to assess a penalty. In fact the only authority given in K.S.A. 65-3415(a) is in section (d) which covers a long term care disposal area which is not what Dickerson Recycling was or is.

Further K.S.A. 65-3415 gives the County or District Attorney authority to file appropiate actions to enforce the KDHE Act.

Nothing in the Act addresses repayment of funds given as

grants by the Act. The attempt by KDHE to assess a penalty of $5,000.00 for a cleanup being included in the same allegations violates Dickerson Recycling's due process rights.

Dickerson Recycling would agree to a dismissal and a proper refiling of the issue of the $5,000.00 fine for cleanup, or to have the County, District Attorney in Leavenworth County file an action in Leavenworth County, Kansas.

For these reasons Dickerson Recycling asks this cause be dismissed.

Durand Dickerson

APPENDIX-1
DICKERSON OBJECTING TO JURISDICTION OF THE HEARING OFFICER'S HEARING TAKEN FROM TRANSCRIPT IN THE HEARING IN THE DISTRICT COURT ON MAY 17, 2002 STARTING FROM PAGE 15 THROUGH 19

MR. DICKERSON: This is a contract, and I've been saying this from day one, and that Kansas Administrative Procedure Act is not for contract disputes, only administrative law. So, I don't know why we hear it. And I'm saying, too, that the - - - if it's a contract, let me think, and even in the Final Order of the Presiding Officer, she brought out that it was a contract. And let me quote that for you. In the Presiding Officer Report, it brings out, "Although neither K.S.A. 65-3415 nor 65-3415a provides for a hearing before the agency regarding grant repayment claims, the law in Kansas supports KDHE's authority." Now, I wonder what law. There's no facts. There's no statute or anything that stated what law that KDHE used to try to recoup this grant money. And, so, I'm saying it's a contract, so, let's take it to the District Court.

The county attorney or the District Attorney, according to K.S.A. 65-34 - - I don't know, 10 or 15, one of them - - let me get that right. I have to get it right.

THE COURT: It would be helpful in case I need a quick reference.

MR. DICKERSON: Okay. I better get it right then. K.S.A.65-3414, and it says, "Enforcement by County or District Attorney. The county or district attorney of every county is hereby authorized and directed to file appropriate actions for enforcement of this act. The county or district attorney filling the action shall notify the secretary before filing the action." I'm saying this, that's the way to go. And because they did not follow procedures, this Court lacks subject matter jurisdiction to hear this case - - -

MR. ANDERSON: I would agree with that.

MR. DICKERSON: - - on the - - excuse me, this Court has jurisdiction to hear this dispute on jurisdiction - - on subject matter jurisdiction. KDHE - - thank you, Mr. Anderson - - lacks jurisdiction to impose - - they lack jurisdiction in the way that they tried to recoup the grant funds. And I don't understand how the Presiding Officer came up with these. This Initial Report became a Final Report, and she said, "Although neither K.S.A. 65-3415 nor 65-3415a provided for a hearing before the agency regarding grand repayment claims, the law in Kansas supports KDHE's authority." And that's on Page 23, Number 6, of her Order.

Then it goes down to Number 7, within the same breath, she said that, "The presiding officer thus finds she has jurisdiction over the grant repayment claim asserted in this proceeding under the provisions of K.S.A. 65-3415 and 65-3415a". So, a few lines up she said she did not have jurisdiction, and then within the same breath she says she had jurisdiction. And she said that she got this jurisdiction by, " .... and according to the decision of the Shawnee County District Court in Case No. 00-C-827 issued on January 4, 2001." I never seen that in your Order that gave them jurisdiction to recoup the grant money. And, ".... an appeal of which the Kansas Court of Appeals rejected by order issued on April 20, 2001." I didn't see how they got- - I don't see how they got jurisdiction to over - - I don't see how they got jurisdiction over the recouping of the grant payment claims.

And in her conclusion of law - - thank you for being patient with me. Okay. In her conclusion of law, beginning on page 20 on her Final Report, she had, "Introduction," Number 1; "Jurisdictional challenge," Number 2; Number 3 she had "Legislative scheme." Okay. I read that, and it says, "It is the policy of the state of Kansas to establish and

maintain a cooperative state and local program for comprehensive solid waste management, to utilize the capabilities of private enterprise to effectively manage solid waste, and to develop strategies that reduce, reuse, and recycle materials, K.S.A. 65-3401." Okay.

So, here I'm saying that the legislative scheme is to hand out grant money. That's what I'm saying. "To further these policies, the Kansas legislature has given KDHE express authority to 'adopt suitable measures... to encourage recovery and recycling of solid waste for reuse whenever feasible.' More specifically, the Kansas legislature has expressly delegated to the Secretary of KDHE the authority to administer 'competitive grants.'" That's all they're saying. Okay. So, I can't see where under legislative scheme where it gives KDHE authority to try to recoup the grant money issue. Under that, it only gives them authority to hand out money. So, my thought is that they don't have – they didn't have subject matter jurisdiction, then to recoup the grant money.

On page 22 of the Presiding Officer's Order, it breaks out the - - under Number 5 on the "District court decision," so your decision, Judge, it says that when you, " .. Characterized KDHE's administrative order seeking repayment of grant funds as 'Agency action' under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions," she goes on to say in Number 5, again, "Whether either K.S.A.65-3415 or 65-3415a provides for a KAPA hearing is not particularly relevant because the District Court considered KDHE's administrative order to be agency action." Okay. And , so if it's not relevant, than what is relevant and how did they get jurisdiction? To me it's relevant.

APPENDIX -J

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS, DIVISION SEVEN

FILED BY CLERK
KS. DISTRICT COURT
THIRD JUDICIAL DIST
2007 JUL 11 P 2:04

DURAND DICKERSON,
Petitioner,

Vs.

Case No 01C777

STATE OF KANSAS,
DEPARTMENT OF HEALTH
AND ENVIRONMENT,
Respondent.

MEMORANDUM OPINION AND ORDER

NATURE OF THE CASE:

This case is an appeal from a decision of the Kansas Department of Health & Environment finding that the Petitioner, Durand Dickerson, as the grantee under a contract with the Department, was liable to repay $39,216.38 to the agency for his misexpenditure of funds advanced under his grant and additionally that he be fined $5,000 for violating K.S.A. 65-3409 (a)(1) and (5) by his failure to properly dispose of paper products, which by his neglect, had become solid waste.

The subject matter of this case was first before the Court in 00C827 where the Plaintiff challenged the agency's authority to proceed on these same issues specified against him as entered by notice of a proposed order directed to him under date of February 28, 2000. The Petitioner there requested the Court enjoin the agency from proceeding. The Court, by a Memorandum Opinion under date of January 4, 2001, held that the agency had authority to adjudicate the K.S.A. 65-3409

(a)(1) and (5) proceedings against him as authorized pursuant to K.S.A. 65-3419 and that his appeal to the District Court of this issue was premature and without basis under K.S.A. 77-608 and therefore jurisdictionally improper and inappropriate for either judicial review or injunctive relief. (Memorandum Opinion, at pg. 4; Record on Appeal, at pg. 161). The Court further found that the agency had authority to issue its order of February 28, 2000, in regard to the separate issue of its demand for repayment of allegedly misexpended grant funds under the Kansas solid waste statutes, K.S.A. 65-3401, et seq. The Court found that the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KAJR) (K.S.A. 77-601 et seq.) applied since the agency's notice of February 28, 2000 constituted "agency action" as defined by the Act (K.S.A. 77-602 (b)(3). The Court, however, declined both injunctive relief or review because Mr. Dickerson, d/b/a, was required to first have the agency's claim for misexpended grant funds administratively adjudicated since such opportunity was available pursuant to an agency rule (K.A.R. 28-3-7) promulgated under valid agency authority (K.S.A. 65-5625). It was this agency proceeding that Mr. Dickerson was seeking to enjoin or appeal. Further, the Court held his appeal of the issues raised under the KAJR at the time was premature (K.S.A. 77-608) and injunctive relief probably inappropriate, and certainly not imperative, given the agency's clear authority to administer solid waste grant funds and the availability of the K.A.R. 28-3-7 administrative review proceeding invoked and in-progress. Further, the Court declined injunctive relief in favor of the agency's opportunity for review and determination of its own jurisdiction on this issue (Memorandum Opinion, at pgs. 4-12; Record on Appeal at pgs 161-169).

The case is now before the Court after the entry of the agency hearing offices's decision finding that Mr. Dickerson, d/b/a/, had, in fact, violated K.S.A. 65-3409(a)(1) and (5), that

the proposed $5,000 fine was appropriated, and further that, in fact, Mr. Dickerson, d/b/a/, was obligated to repay $39,216.38 in grant funds. However, the present issues briefed are not based on the underlying factual and legal merits of the hearing officer decision, but come yet again on before the Court on jurisdictional questions. The Kansas Department of Health and Environment has filed a motion to dismiss Mr. Dickerson appeal based on his alleged failure to exhaust his administrative remedies before the agency by failing to seek review of the hearing officer's opinion by the Secretary of the agency, citing K.S.A. 77-527, a provision of the Kansas Administrative Procedure Act (KAPA) (K.S.A. 77-501 et seq.) and the requirement of K.S.A. 77-612 of the KAJR. Mr. Dickerson responds, as he did previously, that the agency is without authority jurisdictionally and failed to assert jurisdictionally appropriate claims against him, in whole or in part.

CONCLUSION OF LAW:

The Court finds that the motion to dismiss of the Kansas Department of Health and Environment should be sustained as to the issue adjudicated of whether Mr. Dickerson violated K.S.A. 65-3409(a)(1) and (5) by failing to properly dispose of paper held for recycling, which through improper storage, became solid waste and for which a fine of $5,000 was imposed under the authority of K.S.A. 3419(b), and within the amount authorized by K.S.A. 3419(a). The adjudication of such an issue as this and the imposition of a fine is expressly committed by K.S.A. 65-3419(c) to be subject to adjudication under the provisions of the Kansas Administrative Procedure Act (K.S.A. 77-501 et seq.). Subsection (d) of K.S.A 65-3419 directs that any action of the Secretary under this statute is thereafter subject to review under the KAJR.

The Kansas Administrative Procedure Act provides the

opportunity for further review of an initial order such as the order issued by the hearing officer in this case *under K.S.A. 65-3419* (K.S.A. 77-527 (b)). Here, Mr. Dickerson failed to avail himself of this opportunity for review by the Secretary of Health and Environment of this issue of the violation of K.S.A. 65-3409(a)(1) and (5). By foregoing this opportunity for further agency review, Mr. Dickerson failed to meet the exhaustion of administrative remedies requirement of the KAJR and thus lost his right to judicial review of this issue (K.S.A. 77-612: "A person may file a petition for judicial review .... only after exhausting all administrative remedies available ..... [unless] this act or any other statute states that exhaustion in not required'). Here neither the KAJR nor any other applicable statute waives this exhaustion requirement and the courts have held exhaustion is required in this circumstance where the Kansas Administrative Procedure Act controls the agency adjudication process (*Expert Environmental Controls, Inc. V. Walker*, 13 Kan. App. 2d 56 (1988).

However, the same cannot be said when the particular agency action is not governed by the Kansas Administrative Procedure Act, such as here for the agency's attempt to recoup grant funds misexpended under the terms of its grant agreement with Mr. Dickerson. Unlike the K.S.A. 65-3409(a) (1) and (5) violation, whose adjudication was prescribed by K.S.A. 3419, and which statute incorporated the Kansas Administrative Procedure Act, the provisions of the agency's governing statutes authorizing the solid waste grant program (K.S.A. 65-3401 et seq.; K.S.A. 65-3415(c) are silent as to any administrative remedy. However, the agency, under its general authority (K.S.A. 65-5625), provides an administrative remedy for review of its agency's actions (K.A.R. 28-3-7) which was available to Mr. Dickerson. Here Mr. Dickerson, d/b/a/, took advantage of that administrative remedy. However, neither K.A.R. 28-3-7 nor any other applicable

statute or agency regulation provides the opportunity for subsequent review by the Secretary of its hearing officer's decision on this grant recoupment claim and, as noted, the KAPA has not been adopted by statute generally for this agency. Thus, since the KAJR is specifically mandated as the means for review of this agency's actions under the solid waste disposal act (K.S.A. 65-3417(b)), the provision of K.S.A. 77-612 would apply and Mr. Dickerson, in order to qualify for judicial review, need only have availed himself of the administrative remedies available. As no administrative remedies beyond the dictates of K.A.R. 28-3-7 are available through the agency, Mr. Dickerson has exhausted his administrative remedies in regard to the grant recoupment claim. Accordingly, Mr. Dickerson is entitled to judicial review on the merits of the agency record in regard to the agency's conclusion that he owes the agency $39,216.38

While Mr. Dickerson still maintains the agency lacks jurisdiction of the grant fund claim, the Court finds, for the reasons stated in its previous memorandum opinion and here, that the KDHE had jurisdiction over the claim and that his remedy is by way of the KAJR and not by way of injunction, particularly in light of K.S.A 65-3417(b) which prescribes the KAJR as the remedy under the solid waste act, which statute the Court failed to note in previous discussions.

Accordingly, and for the reasons noted above, Mr. Dickerson's appeal regarding violation of K.S.A. 65-3409(a) (1) and (5) and the fine of $5,000 imposed under the authority of K.S.A. 65-3419(a) and (b) should be dismissed. Further, the Court finds that appeal by the way of the KAJR is the sole remedy available to challenge the agency's decision concering recoupment of grant funds and was properly exercised by Mr. Dickerson. No issue of damages to Mr. Dickerson, or his d/b/a, was properly before the agency. Accordingly, both Mr. Dickerson's request for injunctive relief and damages are

denied. The Kansas Department of Health and Environment's motion to dismiss his appeal in regard to the recoupment issue is denied.

The parties are further given a simultaneous period to August 16, 2002, to file any additional briefs or arguments for the Court's consideration on the merits of the hearing officer's decision affirming the agency's entitlement to recoup $39,216.28 in misexpended grant funds. If no request for further oral argument is made, the Court will deem the matter finally submitted on such date.

The Court will defer entry of final judgment on all issues until it has decided the merits on the balance of the issues raised by the appeal.

IT IS SO ORDERED this 11th day of July, 2002

"s/ Franklin R. Theis
District Court Judge
Division Seven"

APPENDIX-K
"NEW LAW"

AN ACT concerning solid waste; amending K.S.A. 1999 Supp.65-3415, 65-3415(a) and 65-3415(b) and repealing the existing sections

65-3415. Solid waste grants. (a) The secretary is authorized to assist counties, designated cities or regional solid waste management entities by administering grant to pay up to 60% of the costs of preparing and revising official plans for solid waste management systems in accordance with the requirements of this act and the rules and regulations of this act and the rules and regulations and standards adopted pursuant to this act, and for carrying out related studies, surveys, investigations, inquiries, research and analyses.

(b) The secretary is authorized to assist counties, designated cities, municipalities, regional solid waste management entities that are part of an interlocal agreement entered into pursuant to K.S.A. 12-2901 et seq. And amendments thereto or other applicable statutes, colleges, universities, schools, state agencies or private entities, by administering competitive grants that pay up to 75% of the eligible costs incurred by such a county, city, regional entity, college, university, school, state agency or private entity pursuant to an approved solid waste management plan, for any project related to the development and operation of recycling, source reduction, waste minimization and solid waste management public education programs. Such project shall include, but not be limited to, the implementation of innovative waste processing technologies which demonstrate non-traditional methods to reduce waste volume by recovering materials or by converting the waste into usable by-products or energy through chemical or physical processes. To be eligible for competitive grants awarded pursuant to this section, a county, designated city, regional entity, college, university, school, state agency or private

entity must be implementing a project which is part of a solid waste management plan approved by the secretary or implementing a project with statewide significance as determined by the secretary with the advice and counsel of the solid waste grants advisory committee.

(c) The secretary is authorized to assist counties, cities or regional solid waste management entities that are part of an interlocal agreement entered into pursuant to K.S.A. 12-2901 et seq. and amendments thereto or other applicable statutes, by administering grants that pay up to 60% of costs incurred by such county, city, or regional entity for:

(1) The development or enhancement of temporary and permanent household hazardous waste programs operated in accordance with K.S.A. 65-3460 and amendments thereto;

(2) the first year of operation following initial start-up of temporary and permanent household hazardous waste programs; and

(3) educating the public regarding changes in household hazardous waste collection program operations or services.

(d) The secretary is authorized to assist counties, cities or regional solid waste management entities that are part of an interlocal agreement entered into pursuant to K.S.A. 12-2901 et seq. And amendments thereto or other applicable statutes, by administering grants that pay up to 75% of costs incurred by such a county, city or regional entity to develop and implement temporary agricultural pesticide collection programs.

(e) The secretary is authorized to assist counties, cities or regional solid waste management entities that are part of an interlocal agreement entered into pursuant to K.S.A. 12-2901 et seq. and amendments thereto or other applicable statutes, by administering grants that pay up to 75% of costs incurred by such a county, city or regional entity to develop and implement exempt small quantity hazardous waste generator waste collection programs, subject to the following:

(1) The aggregate amount of all such grants made for a fiscal year shall not exceed $150,000; and

(2) no grantec shall receive shall receive any such grants in an aggregate amount exceeding $50,000.

(f)(1) Failure of any public or private entity to pay solid waste tonnage fees as required pursuant to K.S.A. 65-3415(b) and amendments thereto, shall bar receipt of any grant funds by such entity until fees and related penalties have been paid.

(2) Failure of a county or regional authority to perform annual solid waste plan reviews and five year public hearings, and submit appropriate notification to the secretary that such actions have been carried out pursuant to K.S.A. 65-3405, and amendments thereto, shall bar receipt of any grant funds by any entity within the jurisdiction of such county or regional authority unless the grant would support a project expected to yield benefits to counties outside the jurisdiction of such county or regional authority.

(3) A city, county, regional authority, college, university, school, state agency or private entity shall not be eligible to receive grants authorized in K.S.A. 65-3415, and amendments thereto, if the department determines that such city, county, regional authority, college, university, school, state agency or private entity is operating insubstantial violation of applicable solid and hazardous waste laws or rules and regulations.

(4) The secretary may establish additional minimum requirements for grant eligigility.

(g) If the secretary determines that a grant recipient has utilized grant moneys for purposes not authorized in the grant contract, the secretary may order the repayment of such moneys and cancel any remaining department commitments under the grant. If the grant recipient fails to comply with the secretary's order, the secretary may initiate a civil action in district court to recover any unapproved expenditures,

including administrative and legal expenses incurred to pursue such action. Recovered grant moneys or expenses shall be remitted to the state treasurer, who shall deposit the entire amount inthe state treasury and credit it to the solid waste management fund.

(h) All grants shall be made in accordance with appropriation acts from moneys in the solid waste management fund created by K.S.A. 65-3415a and amendments thereto.

(i) Local match requirements for all solid waste grant programs may be met by in-kind-contribution.

APPENDIX-L

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS, DIVISION SEVEN

FILED BY CLERK
DISTRICT COURT
JUDICIAL DIST.
TOPEKA, KS

DURAND DICKERSON
Petitioner,

vs.

STATE OF KANSAS, DEPARTMENT OF HEALTH AND ENVIRONMENT,
Respondent.

Case No. 00C827

MEMORANDUM OPINION AND ENTRY OF JUDGMENT

NATURE OF THE CASE:

This is an action filed by the Petitioner, Durand Dickerson styled as an appeal pursuant to the Kansas Act for Judicial Review & Civil Enforcement of Agency Actions, K.S.A. 77-601 et seq., where he either as part of such appeal, or independently, seeks to enjoin the Kansas Department of Health & Environment from duly notice proceedings involving him.

The procedural facts underlying this case, as may be gleaned from the official agency record, indicate that the Petitioner, Mr. Dickerson, d/b/a/ Dickerson Recycling Center and the Respondent, the Department of Health & Environment, entered into a agreement in April, 1996, to "(p) erform the activities according to the grant proposal as approved by KDHE in the notification letter and incorporated herein" in furtherance of the agency's authority under the solid waste

disposal act. (K.S.A. 65-3401 et seq.) See, Record on Appeal, at 27-30: "Contract", at "I I". Under this contract, KDHE agreed to reimburse Dickerson Recycling Center up to 75% of certain expenditures not exceeding a sum of $52,411.50.

The proceedings below, in part, seek to recoup grant moneys expended which the Respondent Department subsequently determined had not been expended in accordance with the terms of the underlying incorporated grant proposal. Additionally, the Department's underlying proceedings - in addition to seeking return of $39,216.38 claimed improperly reimbursed to the Petitioner under the grant - also seeks to fine the Dickerson Recycling Center in the amount of $5,000 under the authority of K.S.A. 65-3419 for an alleged violation(s) of K.S.A. 65-3409(a)(1) and (5) for purportedly unlawfully abandoning and disposing of solid waste (Record on Appeal, at 1-4: "Notice of February 25, 2000, Administrative Order and Intent to Assess Civil Penalty.")

Upon receipt of the referenced "Notice", Mr. Dickerson, d/b/a/, duly requested a hearing within the time frame of the "Notice", but now seeks, as noted, to enjoin these proceedings claiming that the Respondent's remedy, at least vis-a-vis the grant recoupment action, is not within the authority of the Secretary or, in any manner, not a matter committed to an internal agency administrative proceeding such as envisioned by the Kansas Administrative Procedure Act (K.S.A. 77-501 et seq.). He additionally claims that the attempt to subject him to internal agency adjudication violates his due process rights under the United States and Kansas Constitution.

CONCLUSIONS OF LAW:

No question can exist, but that the Department's action in reference to its authority under K.S.A. 65-3409 or 65-3419

has the requisite jurisdiction to proceed against Dickerson Recycling, and given Mr. Dickerson's request for hearing, now has the jurisdictional obligation to proceed to adjudicate his contest of the agency's action in reference to the claimed alleged violations of the Kansas Solid Waste Disposal Act. Thus in so far as the Petitioner seeks injunctive relief against this prong of the proceedings, his Petition fails to establish a basis for judicial intervention at this interim stage of the proceedings (K.S.A. 77-608) or to establish a basis for injunctive relief on the grounds that KDHE is acting without the scope of its authority or upon an issue not within its competence. (*Zarda v. State,* 250 Kan. 364 (1992). No constitutional due process issue is implicated.

However, the Petitioner's principal, if not the exclusive complaint, is that the KDHE is acting *ultra vires* in proceeding administratively against him in regard to the alleged breach of his d/b/a/ grant contract with the Department. He asserts that since no statute, unlike, by example, K.S.A. 65-3419(c), which applies to the adjudication of alleged violations arising under K.S.A. 65-3409, provides for hearing such contractual disputes administratively nor is the Kansas Administrative Procedures Act mandated for such an issue.

While Petitioner correctly notes that since the Kansas Administrative Procedures Act is not incorporated generally for this agency or specifically for this class of dispute and therefore does not apply (K.S.A. 77-503 (a)), the conclusion that he draws therefrom that the agency is therefore powerless to proceed administratively to internally adjudicate its claim against him on an appeal that he, himself, requested goes beyond the pale of proper legal inference.

It seems clear that the KDHE was given express authority by the Kansas legislature to enter into grants with private entities, such as the Dickerson Recycling Center, to further the purposes of the solid waste disposal act. (K.S.A (1996)

65-3415 (c): "The secretary is authorized to assist ... private entities, by administering competitive grants that pay up to 75% of eligible cost incurred by such a ..... private entity ....")

This provision was in furtherance of the legislature's intent to provide for the safe, sanitary disposal of solid wastes by establishing financial assistance for comprehensive waste management, that also utilized the capabilities of private enterprises, and encourage recycling (K.S.A. 1996, 65-3401).

Petitioner's position therefore, it taken to its logical extreme, would mean that even if an agency had authority under its legislative mandate to act in furtherance of a legislative purpose, it would be compromised from following through with its legislative mission because the legislature provided no specific agency mechanism for the agency to call upon should its grant awardees fail to heed the dictates of their agreements with the Department. This simply is not a correct standard or assumption since the grant of power itself to an agency to accomplish a purpose necessarily carries with it all the reasonably necessary implied subordinate powers to effectuate the authority provided. See, *The State, ex rel. vs. Davis,* 114 Kan. 283, 289-290 (1923). A fundamental aspect of governmental power is the power to see that its laws and their purposes are fulfilled. *State, ex rel. vs. Basham,* 146 Kan. 181, 185-186 (1937). And, as this particular agency has done, it has established - through its rule making power - an internal hearing procedure to afford fairness and due process to those affected by its actions, rulings, orders, or requirements. (K.S.A. 75-5625; K.A.R. 28-3-7).

Here then, the question raised is reduced to whether an agency, at the request of the person effected, may adjudicate an order of the agency that is premised on a supposed breach of contract by one of its grantees. At least prior to July 1, 2000, there is no apparent reason why an agency's finding and order demanding that funds advanced per a contract

(grant) be returned to the agency because of its breach (by misexpenditures by the grantee) could not be required to, at last initially, be adjudicated administratively. There seems no reason to distinguish an agency order premised on a grantee's breach of conditions upon which funds were advanced under a grant from any other order an agency might make, assuming, of course, it had the authority initially to do the act (enter the contract). Here that is beyond question. Resort to agency appellate procedures and thereafter appeal to the courts under the Act for Judicial Review and Civil Enforcement of Agency Actions (K.S.A 77-601 et seq.) has been the premise for prior disputed agency actions based on a claim of breach of contract. Compare, *Schall v. Wichita State University,* 269 Kan. 456, 481 et seq. (2000) and cases cited therein. Also, see K.S.A. 77-602 (b): "Agency action": means .....(3) an agency's performance of ..... any other duty, function, or activity ....." Both this latter statute and the referenced cases support that recourse and remedy, at least for the one who complains of the agency action, is governed by the KAJA. No reason appears why the reverse should not be true.

Here, had Plaintiff not contested KDHE's proposed "Notice", the agency's order demanding a return of funds advanced, regardless of reason, would have been deemed conclusive (Id.) and would have given the agency the authority thereafter to enforce its order in the district court (K.S.A. 77-624 et seq.). In actuality, given the fact - at least as preliminarily found by the Department - that the agency sent Dickerson Recycling Center a notice pursuant to a letter dated September 29, 1997, directing him to pay back $39,216.38 sum now sought (Record on Appeal, at page 2, "Findings of Fact." at (2)."), a procedural question is raised as to whether now, as a result of the absence of an appeal by Dickerson Recycling Center from this 1997 directive concerning the same issue, the new notice and the availability of an internal agency proceeding may not be a redundant

exercise in reference to the return of these grant funds. (*Schall v. Wichita State University,* id. K.S.A. 77-602(b)).

However, given the amendment to K.S.A. 65-3415, effective July 1, 2000, if any doubt existed as to remedy, one is now specified:

> "If the secretary determines that a grant recipient has utilized grant moneys for purposes not authorized in the grant contract, the secretary may order the repayment of such moneys and cancel any remaining department commitments under the grant. If the grant recipient fails to comply with the secretary's order, the secretary may initiate a civil action in district court to recover any unapproved expenditures, including administrative and legal expenses incurred to pursue such action. Recovered grant moneys or expenses shall be remitted to the state treasurer, who shall deposit the entire amount in the state treasury and credit it to the solid waste management fund."
>
> (L. 2000, ch. 96, S2)

Except as to the authority to recover administrative and legal expenses, this new legislative enactment seems to do no more than reafirm the Secretary's previous authority (K.S.A. (1996) 65-3415(b)) and the agency's authority to proceed pursuant to K.S.A. 77-624 et seq., if no appeal of the agency's directive had been effected.

In any manner, given it is the Petitioner who has brought this matter to Court seeking injunctive relief, the above discussion is relevant primarily to point out that Mr. Dickerson's claim for injunctive relief is not well founded, given that the procedure of which the Petitioner complains is the very one he invoked by his act of appeal of the agency's "Notice". Whereas, while his act of appeal may have been of

necessity in regard to the alleged K.S.A. 65-3409 violations so that he might avail himself of the protections afforded under K.S.A. 65-3419 (c), his appeal of the issue regarding the grant moneys can certainly do him no harm, particularly in light of his failure to appeal from the September 1997 agency directive ordering him to return mis-expended grant funds, as noted above. In any manner, any unlawful burden he feels has been placed upon him is certainly one he can relieve himself of - though perhaps at his own peril - by withdrawing his appeal of the issue relating to the return of the grant money. This would force the agency to elect any further procedure for resolution of this issue. However the dispute evolves, it is clear further adjudication by eventually, a court is an option to either party. As such, a court at that time could address any substantive or procedural issues raised. For this reason, Mr. Dickerson's appeal is premature and not proper. This Court would now not make choices for the Petitioner or the agency nor decide issues that can be decided later in due course.

Becaue of this lack of ripeness, the Court would exercise its discretion to decline the injunctive relief requested in reference to the agency proceeding seeking return of the grant moneys. Further, the Court would expressly find that Petitioner's request to enjoin the agency proceeding as the proceeding relates to the agency's action pursuant to K.S.A.65-3409 and K.S.A. 65-3419(a) fails to state a claim and is without merit.

ENTRY OF JUDGEMENT

Judgment is hereby entered for the Respondent, Kansas Department of Health & Environment, and against the Petitioner, Durand Dickerson, by the dismissal of his appeal under the authority of K.S.A. 77-608 and the denial of his

request for injunctive relief whether sought independently (K.S.A.60-901) or under the Kansas Act of Judicial Review and Civil Enforcement of Agency Actions for all the reasons stated above. Costs are taxed to the Petitioner, Durand Dickerson.

IT IS SO ORDERED this 4th day of January, 2001.

"s/ Franklin R. Theis
District Court Judge
Division Seven"

APPENDIX-M
DICKERSON'S COURT OF APPEALS BRIEF

NO. 0390263-A

IN THE COURT OF APPEALS OF
THE STATE OF KANSAS

DURAND DICKERSON
Plaintiff/Appellant

vs.

STATE OF KANSAS, DEPARTMENT
OF HEALTH AND ENVIRONMENT

BRIEF OF THE APPELLANT

APPEAL FROM THE DISTRICT COURT
OF SHAWNEE COUNTY, KANSAS
HONORABLE FRANKLIN THEIS, DISTRICT JUDGE
DISTRICT CASE NO. 01-C-0777

SUBMITTED BY:
DURAND DICKERSON
1514 10TH AVENUE
LEAVENWORTH, KANSAS 66048
(913) 651-7397

15 MINUTES ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

(A)

The District Court had jurisdiction pursuant to K.S.A. 77-612(a)(b) from the Hearing Officer's Report, Initial Order and final Order pursuant to K.S.A. 77-530, (Vol. 1 Pg. 288)

The agency KDHE had jurisdiction to hear the issue of the $5,000.00 fine and cleanup pursuant to K.S.A. 65-3409a. However KDHE's jurisdiction to hear the issue of return of grant money is in question, constitutionally and statutorily.

(B)

This Court has jurisdiction to hear the judgment filed, pursuant to K.S.A. 60-2102 (a) and (c) and K.S.A 60-2102 (a)(4). The judgment order dated January 3, 3003, (Vol. 3, pg. 229) is a final appealable order from a District Court.

(C)

Dickerson filed his Notice of Appeal on January 31, 2003 (Vol. 3, pg. 230) in a timely manner.

(D)

This appeal is from a Memorandum Opinion and Entry of Judgment filed December 5, 2002 (Vol. 3, pg. 219), and a Motion Objecting to the Court's Findings, filed on December 20, 2002 (Vol. 3, pg 227) and judgment filed on January 3, 2003 (Vol 3, pg. 229) which disposed of all the party's claims.

STATEMENT OF ISSUES

Did the Hearing Officer have subject matter jurisdiction to hear and adjudicate the return of grant money?

Should the Hearing Officer have bifurcated the civil and return of grant money issues?

Did the Hearing Officer's continuation of the hearing violate the Accordi Doctrine?

Was the Hearing Officer's Final Order ex post facto application of law?

Should the return of grant money have been adjudicated pursuant to contract law?

STATEMENT OF THE CASE

(A)

NATURE OF CASE

This case is an appeal from a judgment in the District Court of Shawnee County, Kansas (Vol. 3, pg. 229) affirming the Hearing Officer's Report, Initial and Final Order (Vol. 1, pg. 258-288) from a hearing by Kansas Department of Health and Environment, for a $5,000.00 assessment for waste clean-up and return of $39,216.38 grant funds pursuant to a contract between Dickerson and KDHE, (Vol. 1 pg. 203-206).

(B)

COURSE OF PROCEEDING

KDHE on February 28, 2000 issued a Notice of Administrative Order and Intent to Assess Civil Penalty to

Dickerson (Vol 1, pg. 1-4).

On March 16, 2000 the Hearing Officer issued her Notice of prehearing Conference to be held by telephone on April 13, 2000 (Vol. 1, pg. 7-9). On June 26, 2000 the Hearing Officer issued an Order Reserving Ruling and Amending Notice of Hearing on June 26, 2000 (Vol 1, pg. 78-86).

On July 13, 2000 Dickerson filed for Judicial Review and Temporary Injunction in Shawnee County District Court, case no. 00-C-827 (Vol. 1, pg. 52-57).

On July 17, 2000 the Hearing Officer conducted a Status Conference and Ordered a Continuance and Order of Clarification (Vol. 1 pg. 87-91).

On January 4, 2001 the Shawnee County District Court filed a Memorandum Opinion and Entry of Judgment dismissing Dickerson's petition(Vol.1 pg. 97-109).

On January 31, 2001, Dickerson filed an Notice of Appeal.

On February 6, 2001 the Hearing Officer conducted a Status Conference and than issued a Second Pre- Hearing Order and Notice of Hearing, (Vol. 1 pg. 131-136).

On April 17, 2001 the Hearing Officer proceeded with the hearing

On May 15, 2001 the Hearing Officer issued an Order Extending the Time Limit to June 8, 2001 to issue her report and Initial Order.

On July 9, 2001 Dickerson filed a petition in the District Court of Shawnee County, Kansas (Vol. 2, pg 5).

On December 3, 2001 Judge Franklin R. Theis sent a letter setting forth a briefing schedule (Vol. 3, pg. 120).

On January 2, 2002 Dickerson filed his brief, (Vol 3, pg. 121)

On May 17, 2002 a motion hearing was held (Vol. 4, pg. 1-25).

On July 11, 2002, the District Court issue a Memorandum

Opinion and Order granting KDHE $5,000.00 fine and further briefing on the grant money (Vol.3, pg. 141)

On December 5, 2002 Judge Franklin R. Theis issued his Memorandum Opinion and Entry of Judgment (Vol. 3. Pg.219).

On December 20, 2002 Dickerson filed his Motion Objecting to the Court's Findings and a Motion Requesting a Hearing on the Court's findings (Vol. 3, pg. 226-227).

On January 3, 2003 the District Court filed its judgment (Vol. 3, pg. 229).

(C)

DISPOSITION BELOW

On July 11, 2002 (Vol. 3, pg. 141) the District Court issued a Memorandum Opinion and Order that dismissed Dickerson's appeal concerning the $5,000.00 fine (Vol. 3, pg. 149) and that appeal pursuant to KAJR is the sole remedy to challenge the $39,216.38 recoupment, and denied KDHE Motion to Dismiss (Vol. 3, pg. 149).

On December 5, 2002 the District Court entered it's Memorandum Opinion and Entry of Judgment.

STATEMENT OF FACTS

This case concerns the authority of KDHE pursuant to the Kansas Administrative Procedure Act K.S.A. 77-501 et seq. for a $5,000.00 fine and in the same proceeding invoking KAR 28-3-7 to hear a grant recoupment of $39,216.38 for a grant that was awarded April 5, 1996 (Vol 1, pg. 203-206).

The statue K.S.A. 65-3415 was amended on July 1, 2000 (Vol. 1, pg. 105 & 105) and was not made retroactive.

Therefore Dickerson was forced procedurally to defend in

an Administrative hearing, a contract issue authorized to be hear in a District Court pursuant to K.S.A. 65-3414 and loose his rights to due process in doing so.

These two (2) issues should have been bifurcated from the beginning (Vol. 3, pg. 141-143) as Dickerson had no choice but to use the Administrative Procedure pursuant to the Court Order in Case Nol 00-C-827, filed on January 4, 2001 (Vol. 1, pg. 97-109) wherein he was ordered to do so.

SUMMARY OF THE ARGUMENT

Did it violate Dickerson's due process rights by KDHE filing for a hearing on the fine of $5,000.00 for waste cleanup pursuant to K.S.A. 65-3409(a)(1) and (5) and in the same filing order a hearing for recoupment of grant funds of $39,216.38 pursuant to K.S.A. 65-3415 which at the time of the awarding of the grant in 1996 contained no authority for Administrative Procedure for such recoupment. It did authorize pursuant to K.S.A. 65-3414 for the District or County Attorney to file appropriate actions. The statue K.S.A. 65-3415 was amended on July 1, 2000 to authorize for the recoupment of grant funds K.S.A. 3415(g), however it was not passed retroactive which would have **impaired the contract.**

Therefore Dickerson's due process rights were violated, and KDHE violated the Accardi Doctrine, and proceeded without subject matter jurisdiction as to all issues.

ARGUMENT

(1)
DID THE HEARING OFFICER HAVE SUBJECT MATTER JURISDICTION TO HEAR AND ADJUDICATE THE RECOUPMENT OF GRANT FUNDS?

STANDARD OF APPELLATE REVIEW: *Ruhr Gas v. Marathon Oil Inc.* 526 US 574, 583 (1999).

From the beginning Dickerson in 00-E-39 questioned subject matter jurisdiction of KAPA for the recoupment of the $39,216.38.

KDHE attempts to gain subject matte jurisdiction by arguing that KAPA gives them authority over the $5,000.00 waste fine and then attaching thereto the recoupment which is under K.A.R. 28-3-7 for non KAPA hearings.

Well if the $5,000.00 is a KAPA hearing and the $39,216.38 recoupment is an non KAPA hearing, just what kind of hearing was held. By their own admission, KDHE in one hearing could not have subject matter jurisdiction over both issues in one hearing.

Further supporting lack of subject matter jurisdiction over the $39,216.38 recoupment is the KDHE brief on jurisdiction where they agree that a Court of law may have initial jurisdiction against a contract action, to bifurcate this action would be wrong and costly for both parties. With that said KDHE never pointed to facts or law that would give the Hearing Officer subject matter jurisdiction of the $39,216.38 recoupment.

The July 2000 Amendments to K.S.A.65-3415 specified a remedy "..... The Secretary may order the repayment of such moneys' ....." L. 2000 CH. 96 @2. Nothing in the statues wording or passage makes it retroactive to Dickerson's 1996 grant or the 1999 Order of Hearing.

In his Memorandum Opinion and Entry of Judgment, the District Court states this is an appeal pursuant to K.S.A. 77-601 et seq. and states the adjudicatory procedure used was lawful and the result factually and legally appropriate, without one citing to a statue or case law.

If this Court were to look at the January 4, 2001

Memorandum Opinion in 00-C-827 it would find that Dickerson had no choice but to request a hearing, otherwise he would have lost outright. It goes beyond the pale of proper legal inference to turn a blind eye that if Dickerson had not requested a hearing he would have lost all rights.

To buttress this argument, Dickerson would point out that the legislative was clear under th solid and hazardous waste statue K.S.A. 65-3402 et seq., granted the agency under K.S.A. 65-3414, " ..... County or District Attorney ..... is hereby authorized and directed to file appropriate actions for enforcement of this [ACT]".

Since, Dickerson has only argued subject matter jurisdiction throughout and has not defended any part of this action he should be allowed to defend the $5,000.00 fine for solid waste which should have been bifurcated in th beginning.

For these reasons, KDHE was without subject matter jurisdiction to adjudicate the $39,216.38 recoupment either under KAPA or KAR.

II
SHOULD THE HEARING OFFICER HAVE BIFURCATED THE CIVIL PENALTY AND THE RETURN OF GRANT MONEY ISSUES?

STANDARD OF APPELLATE REVIEW: *Matthews v. Eldridge*, 424 US 319, 335 (1976)

Dickerson has argued that his due process rights were violated by the Hearing Officer not bifurcation the $5,000.00 fine and the $39,216.38 grant recoupment.

There are three (3) factors that determine whether an individual has received the process that the Constitution finds due:

1. Private interest that will be affected by the Official action.

2. The risk of an erroneous deprivation of such interest through the procedure used and the probable value, if any, of any additional or substitute safeguards.

3. The governments interest including the fiscal administrative burdens that the substitute or additional procedure requirement would entail.

The Official action of placing both issues in the same hearing, one with jurisdiction and the other without jurisdiction certainly affected Dickerson due process rights.

The procedure used certainly was an erroneous deprivation of Dickerson's due process rights, as Appellant had to choose whether to defend both actions "one without subject matter jurisdiction" or to raise the issue.

Statutorily, pursuant to K.S.A. 65-3415 KDHE had a procedure for attempting the recoupment of grant money, but chose instead to combine that issue with the $5,000.00 to try and gain jurisdiction.

The fact is the statue of limitations has expired for the recoupment issue and the piggyback of the issue on the $5,000.00 fine violated Dickerson's due process rights.

By weighing these concerns, this Court is able to see that KDHE has not met the fundamental requirement of due process, and in fact, the scheme used by KDHE was a ruse to gain jurisdiction

III

DID THE HEARING OFFICER CONTINUATION OF THE HEARING VIOLATE THE ACCARDI DOCTRINE?

STANDARD OF APPELLATE REVIEW: *Accardi v. Shanghnessy* 347 US 260 (1964), and *Mortin v. Ruiz* 415 US 199 (1974).

The Accardi Doctrine assures that all Administrative Agency follow their own rules so as not to violate due process.

K.S.A. 65-3402 et seq. are the statues and the rules for KDHE. K.S.A. 65-3406(3) sets forth that they are to administer the solid waste management program pursuant to the [Provision of this Act].

K.S.A. 65-3414, a subdivision of the same Act states that enforcement is authorized by the County or District Attorney of this Act".

However, KDHE chose to use KAPA and KAR to enforce this Act.

The KAPA does not apply to KDHE, as the Act did not have an enabling act applicable to KDHE, nor has KDHE passed and enabling act incorporating KAPA or KAR. Only if there is an interrelated reference to KAPA will the KAPA be applicable.

There is not such an enabling act, however, there does not need to be because the Act itself K.S.A. 65-3402 et seq. has its own rules and regulations and enforcement authority.

Dickerson has said from the beginning that this is a contract issue pursuant to contract law and the Act K.S.A. 65-3414 allows for the County or District Attorney to prosecute such action.

Certainly in this instance KDHE willfully chose not to follow its own regulations and passed as statutory for grant recoupment. This violated the Accardi Doctrine.

IV

WAS THE HEARING OFFICER'S FINAL ORDER EX POST FACTO APPLICATION OF LAW?

STANDARD OF APPELLATE REVIEW: *International Mortgage Trust Co. V. Henry,* 30 P2d, 311, (1934), *Thomas v. Hannigan,* #83,428, Court of Appeals, June 9, 2000, Kan.

The Hearing Officer under legal authority cites K.S.A. 65-3415 and K.S.A 65-3415 (a). However the Hearing Officer failed to address that in July 2000, the Legislative amended K.S.A. 65-3415 and added subsection (g) and added that ..... "the Secretary may initiate a civil action in District Court to recover any unapproved expenditures...."

Until this amendment to the statue authority was no where to be found for the Secretary to retrieve grant funds. However the Hearing Officer mistakenly thought that she had authority because of a 2000 Amendment to the statue.

The passage of this Amendment says nothing as to the retroactivity of it. House Bill 2860 contains no language it was to have retrospective force and effect.

Further the Amendment was substantive and procedural. Therefore it can only apply prospectively, and the Legislative did not express its intentions clearly, which is a further presumption against retroactivity.

V

SHOULD THE RETURN OF GRANT MONEY HAVE BEEN ADJUDICATED PURSUANT TO CONTRACT LAW?

STANDARD OF APPELLATE REVIEW: *TMG Life Ins. Co. V. Ashner* 898 P2d 1145, (Kan. 1995).

(Vol. 1, pgs. 203-206) is a contract and a contractual agreement. Item #2 states: "All contractual agreements shall be subject to, govern by, and construed according to the laws of tne State of Kansas.

The KDHE brief on jurisdiction states that: "Even though a Court of law may have initial jurisdiction against a contract action ....."

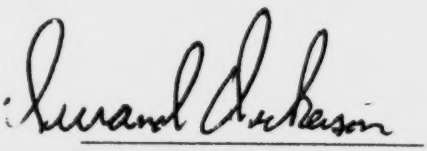
The amendment July 2000 to K.S.A. 65-3415 by adding subsection (g) makes it a contractual issue adjudicable in the District Court.

The transcript of the hearing before Judge Thies, KDHE attorney agrees that the grant money should have been adjudicated in the District Court. This should be enough times throughout these proceedings for this Court to determine that this was a contract dispute that did not fall within the preview of KAPA or KAR.

CONCLUSION

This Court has jurisdiction pursuant to K.S.A. 60-2102(a)(4) to correct, modify, vacate or reverse any act, order or judgment of a District Court in order to assure that any such act, order or judgment is just, legal and free of abuse.

Dickerson asks this Court to remand this cause for a full and fair hearing before the Hearing Officer on the $5,000.00 fine, and a dismissal of the Hearing Officer's order on the $39,216.38 recoupment of grant money for lack of subject matter jurisdiction.



Durand Dickerson

APPENDIX-N

CONTRACT BETWEEN

SECRETARY OF HEALTH AND ENVIRONMENT OF KANSAS

AND

DICKERSON RECYCLING CENTER

SUBJECT: Kansas Solid Waste Competitive Plan Implementation Grant Program [authorized by K.S.A. 65-3415(c)]

DIVISION: Environment

CONTRACT PERIOD: April 1, 1996 through June 30, 1997

CONTRACT AMOUNT: **$52,411.50**

This agreement between the Secretary of the Kansas Department of Health and Enviroment, herein known as the Grantor and **DICKERSON RECYCLING CENTER** herein known as the Grantee, takes effect upon signature of the Secretary and terminates June 30, 1997.

In consideration of the mutual promises contained hereinafter the parties therefore covenant that:

1. The Grantor shall:
   (1) Provide a total reimbursement to the Grantee for up to 75% of the actual expenditures allowed and not to exceed **$52,411.50**

(2) Advance of 25% of the grant contract amount upon execution of the contract.

(3) Reimburse balance of the grant award, except retainage, based upon the receipt of progress reports accomby an Affidavit of Expenditures supported by evidence of expenditure on or before July 31, 1997. No reimbursements will be processed until the advance grant contract amount is expended (See II, 2)

(4) Provide technical assistance to the Grantee and monitor the program for compliance with the approved project proposal.

II. The Grantee shall:

(1) Perform the activities according to the grant proposal as approved by KDHE in the notification letter and incorporated herein.

(2) Submit an affidavit of expenditures for the advance grant amount or a progress report within 90 days from the date of the contract execution. Affidavits requesting reimbursement shall be submitted no more than quarterly with the final report and an affidavit of expenditures for all of the completed activities under the proposal submitted by July 31, 1997. These expenditures shall be only for items agreed to in the grant proposal as approved by KDHE. Affidavits submitted after July 31, 1997, at the sole discretion of the Grantor, may be considered for reimbursement. Reimbursement will only be considered it the total amount of the grant has not been exhausted and the funds are available.

(3) Maintain complete, accurate documentation and current accounting of all program funds received and expended to provide an audit trail to source documentation. Other reports requested by the Grantor shall be submitted within 30 days from the Grantor's request.

(4) Require contracts that specify timetables, procedures for billing, work to be done, and how grantee will compensate the contractor. The contract shall include a definition and description of the services to be provided by the contractor.

(5) Obtain prior approval from the Grantor before any capital equipment purchased with funds from this grant is sold, transferred or otherwise disposes of by the Grantee. Grantee agrees that any proceeds from the sale, transferred or otherwise disposition of capital equipment purchased with funds from this grant will be, at the option of the Grantor, either returned to the Grantor or utilized by Grantee for other expenses related to recycling, source reduction, waste minimization and solid waste management public education programs. No approval will be necessary if the sale, transfer or other disposition occurs more that three years after the termination of this contract.

(6) Submit a final report which will include a breakdown of all costs, a narrative description and summary of all the efforts. The final report should include photographs, video and copies of materials developed where possible.

(7) Return any amount not expended from the advance within the grant period to the Grantor.

(8) Return any other unused grant proceeds to the Grantor.

(9) Comply with all applicable federal, state, and local solid waste management statutes, regulations and ordinances.

III. Both parties mutually agree that:

(1) This agreement may be amended as necessary. Contract extensions and significant amendments shall be in writing and duly executed by both parties. Significant amendments include but not limited to items not mentioned in the grant proposal. Significant amendments do not include contracts for services or purchase of capital equipment approved under paragraph II(3).

(2) This agreement may be terminated by either party by giving at least thirty days written notice in advance of the effective date of cancellation to the other party. No funds shall be expended after the date of the written notice. All unexpended funds must be returned within thirty days of receipt of the written notice.

(3) The provisions found in Contractual Provisions Attachment A (Form DA-146a), which is attached hereto and executed by the parties to the agreement, are hereby incorporated in this contract and made a part thereof.

(4) The grant proposal and notification letter are incorporated by reference into this agreement, is based upon estimates of costs, and there will be flexibility in the use of funds for different categories as long as changes are approved by the Grantor. Grantor reserves the

right to disallow any expenditures upon review. Reports and affidavits of expenditures will provide revised, actual expenditures.

(5) This agreement creates no property right to any grant money. It is understood that there is no right of appeal from any decision of KDHE for any payment or non payment of grant money. The secretary reserves the right to adjust the amount of grant money disbursed based upon availability of funding in the Solid Waste Management Fund pursuant to K.S.A. 65-3415.

(6) This agreement constitutes the whole agreement between the parties, and it is mutually understood and agreed that no alternative or variation to the terms of this agreement shall be valid unless amendments hereto are made in writing and agreed to by both parties.

By signing this agreement, the person below warrants that they have the legal authority to sign this document as an agent of the party.

IN WITNESS WHEREOF; the parties hereto have affixed their signatures on the dates indicated.

Authorized Representative
Dickerson Recycling Center

April 5, 1996
Date

"s/ James J. O'Connell"
James J. O'Connell
Secretary
Kansas Department of Health and Environment

23 April 1996
Date

APPENDIX-O
K.S.A. 65-3415 PRIOR TO JULY 1, 2000

65-3415. Solid waste grants. (a) The secretary is authorized to assist counties, designated cities or regional solid waste management entities by administering grants to pay up to 60% of the cost of preparing and revising official plans for solid waste management systems in accordance with the requirements of this act and the rules and regulations and standards adopted pursuant to this act, and for carrying out related studies, surveys, investigations, inquiries, research and analyses.

(b) The secretary is authorized to assist counties, designated cities, municipalities, regional solid waste management entities that are part of an inter local agreement entered into pursuant to K.S.A. 12-2901 et seq. And amendments thereto or other applicable statutes or private entities, by administering competitive grants that pay up to 75% of eligible costs incurred by such a county, city, regional entity, or private entity pursuant to an approved solid waste management plan, for any project related to the development and operation of recycling, source reduction, waste minimization and solid waste management public education programs. To be eligible for competitive grants awarded pursuant to this section, a county, designated city, regional entity or private entity must be implementing a project which is part of a solid waste management plan approved by the secretary or implementing a project with statewide significance as determined by the secretary with the advice and counsel of the solid waste grants advisory committee.

(c) The secretary is authorized to assist counties, cities or regional solid waste management entities that are part of an interlocal agreement entered into pursuant to K.S.A. 12-2901 et seq. and amendments thereto or other applicable statutes, by administering grants that pay up to 60% of costs

incurred by such a county, city or regional entity for the development and first year of operation of temporary and permanent household hazardous waste programs operated in accordance with K.S.A. 65-3460 and amendments thereto.

(d) The secretary is authorized to assist counties, cities or regional solid waste management entities that are part of an interlocal agreement entered into pursuant to K.S.A. 12-2901 et seq. and amendments thereto or other applicable statutes, by administering grants that pay up to 75% of cost incurred by such a county, city or regional entity to develop and implement temporary agricultural pesticide collection programs.

(e) The secretary is authorized to assist counties, cities or regional solid waste management entities that are of an inter-local agreement entered into pursuant to K.S.A. 12-2901 et seq. And amendments thereto or other applicable statutes, by administering grants that pay up to 75% of costs incurred by such a county, city, or regional entity to develop and implement exempt shall quantity hazardous waste generator waste collection programs, subject to the following:

(1) The aggregate amount of all such grants made for a fiscal year shall not exceed $150,000; and

(2) No grantee shall receive any such grants in an aggregated amount exceeding $50,000; and

(f)(1) Failure to pay solid waste tonnage fees on waste disposed in Kansas pursuant to 65-3415(b) and amendments thereto, shall bar receipt of any grant funds until fees and related penalties have been paid.

(2) The secretary may establish additional minimum requirements for grant eligibility.

(g) The secretary shall prepare and deliver to the legislature on or before January 2, 1998, a report which summarizes all solid waste management grant program activities, solid waste management fund revenues and

recommendations regarding continuation of solid waste management programs.

(h) All grants shall be made in accordance with appropriations acts from the state general fund or from moneys in the solid waste management fund created by K.S.A. 65-3415(a) and amendments thereto.

(i) Local match requirements for all solid waste grant programs may be met by in-kind contributions from counties, designated cities, regional solid waste management entities or private entities.